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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 351

COSMOPOLITAN SHIPPING COMPANY, INC.,
PETITIONER

vs.

ROBERT A. McALLISTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 14, 1948
CERTIORARI GRANTED NOVEMBER 22, 1948

INDEX

	PAGE
Statement	1
Summons	2
Complaint	3
Answer	6
Interrogatories Addressed to Plaintiff	8
Answers to Interrogatories	12
Clerk's Minutes of Trial	16
Testimony	23
Plaintiff's Summation	504
Plaintiff's Requests to Charge	531
Defendant's Requests to Charge	536
Charge of the Court	538
Verdict of the Jury	557
Trial Exhibits	559
Defendant's Motion to Dismiss Complaint, for Directed Verdict for Defendant, to Set Aside Verdict and for a New Trial	625
Notice of Exception to Defendant's Motions	627
Plaintiff's Motion to Set Aside the Jury's Verdict on Second Cause of Action	628

PAGE

Defendant's Motion to Dismiss Complaint, to Set Aside Verdict and for a New Trial 629

Memoranda Denying Motions 630

Judgment 631

Notice of Appeal 632

Appellant's Designation of Record 633

Stipulation Re Defendant's Exhibit D 635

Stipulation as to Record 636

Clerk's Certificate 637

INDEX TO WITNESSES

Plaintiff's Witnesses:

George A. Linnartz,
Direct 24
Cross 51
Re-direct 60

Patrick Edward Napier,
Direct 62
Cross 73
Re-direct 82

Fred A. Bentz,
Direct 89
Cross 98

Robert A. McAllister,
Direct 101, 184
Cross 187
Recalled, re-direct 494
Recalled, re-cross 496

		PAGE
Samuel Frant,		
	Direct	144
	Cross	163
	Re-direct	183
	Re-cross	183
John A. DiFiore,		
	Direct	214
	Cross	229, 249
	Re-direct	244
	Re-cross	246
John Brodowski,		
	Direct	274
Elizabeth Kenny,		
	Direct	281
	Cross	303
	Re-direct	317, 320
	Re-cross	319
Floyd Bullis,		
	Direct	323
	Cross	337
William B. McLeod,		
	Direct	348
Defendant's Witnesses:		
Harold E. Wright,		
	Direct	357
	Cross	362
	Re-direct	364
Edward R. Phillips,		
	Direct	365
William J. Darcy,		
	Direct	369
	Cross	373
Philip M. Stimson,		
	Direct	377
	Cross	408
	Re-direct	426

		PAGE
Robert Ward,		
	Direct	427
	Cross	433
	Re-direct	461
Beverley Chaney,		
	Direct	463
	Cross	466
	Re-direct	475
Jack Moxhay,		
	Direct	475
	Cross	479
Norman Randell,		
	Direct	497
	Cross	499

TRIAL EXHIBITS

Plaintiff's Exhibits:

		ADMITTED AT PAGE	PRINTED AT PAGE
4.	Report of Illness	66	559
5.	Medical History and Orders, U. S. Navy	136	561
6.	Abstract from Clinical Record, U. S. Marine Hospital, San Francisco, California	138	567
7.	Clinical Record and Correspondence, U. S. Marine Hospital, Stapleton, S. I.	184	569
8.	Stipulation of Counsel	206	585
9.	Agreement between National Marine Engineers' Beneficial Association and Cosmopolitan Shipping Company, Inc., General Agent for the War Shipping Administration	493	586

Defendant's Exhibits:

		PAGE
A—Shipping Articles	52	606
C—Memorandum, Lt. Cmdr. D. J. Giorgio	79	607
D—Rough Engine Log	210	
F—Letter from Plaintiff Dated July 18, 1946	272	607
G—General Service Agreement (GAA-4-4-42) between Administrator, War Shipping Administration and Cosmopolitan Shipping Company, Inc.	359	608
H—Allocation of S. S. Edward B. Haines to Cosmopolitan Shipping Company, Inc. as General Agent	359	624

Proceedings in U. S. C. C. A., Second Circuit 638
Opinion, Hand, J. 638
Judgment 645
Clerk's certificate ..... [omitted in printing] 646
Order allowing certiorari 647

District Court of the United States

1

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ROBERT A. McALLISTER,
Plaintiff,

against

COSMOPOLITAN SHIPPING CO. INC.,
Defendant.

2

Statement.

1946

July 16—Summons and complaint filed.
December 5—Answer filed.

1947

June 3—Interrogatories addressed to plaintiff filed.
November 24—Answers to interrogatories filed.

1948

February 2—Trial begun before COXE, J.
February 3—Trial continued.
February 4— " "
February 5— " "
3
February 6— " "
February 9—Trial continued and concluded. Verdict of jury.
February 16—Notice of motion by defendant, to dismiss complaint, for a directed verdict for defendant, and to set aside verdict and for a new trial, filed.
February 20—Notice of motion by plaintiff, to set aside the jury's verdict on the second cause of action, new trial, etc., filed.
February 20—Notice of motion by defendant, to dismiss complaint to set aside the verdict and for a new trial, filed. Exception of plaintiff to defendant's motion to dismiss the complaint filed.

Summons.

February 20—Memorandum (Coxe, J.), denying motion by the plaintiff to set aside the jury's verdict on the second cause of action, filed.
February 20—Memorandum (Coxe, J.), denying motion by defendant to dismiss the complaint, to set aside the verdict and for a new trial, filed.
February 24—Judgment entered.
March 18—Notice of appeal by defendant filed.
March 23—Designation of record by defendant filed.
April 23—Stipulation of counsel re Defendant's Exhibit "D" filed.

Summons.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

ROBERT A. MCALLISTER,
Plaintiff,

v.

COSMOPOLITAN SHIPPING CO. INC.,
Defendant.

To the above named Defendant:

You are hereby summoned and required to serve upon plaintiff's attorney, whose address 220 Broadway, New York, N. Y., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

WILLIAM V. CONNELL,
Clerk of Court.

Date, July 16, 1946.

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

ACTION UNDER SPECIAL RULE FOR SEAMEN TO SUE WITHOUT SECURITY OR PREPAYMENT OF FEES FOR THE ENFORCEMENT OF THE LAWS OF THE UNITED STATES COMMON AND STATUTORY FOR THE PROTECTION OF THE HEALTH AND SAFETY OF SEAMEN AT SEA.

Plaintiff, complaining of the defendant, respectfully states and alleges upon information and belief:

FOR A FIRST CAUSE OF ACTION:

FIRST.—That at all the times hereinafter mentioned, the defendant was and still is a corporation, duly licensed to do business in the State of New York, and having an office and principal place of business in the Borough of Manhattan, City and State of New York.

SECOND.—That at all the times hereinafter mentioned, the defendant managed, operated and controlled a certain steamship or vessel known as the "S.S. Edward B. Haines"

THIRD.—That at all times hereinafter mentioned, the defendant was the operator of the vessel aforementioned under a General Agency Agreement with the owner thereof.

FOURTH.—That pursuant to the terms of the aforesaid agreement, the defendant was required to keep and maintain the aforesaid vessel and its appurtenances in a seaworthy condition.

10 *Complaint.*

FIFTH.—That at all the times hereinafter mentioned, the plaintiff was in the employ of the defendant in the capacity of a seaman.

SIXTH.—That at all the times hereinafter mentioned, there was and still is in force and effect an Act of Congress, known as the Merchant Marine Act, approved June 5, 1920, Section 33, commonly known as the Jones Act, which Act is applicable hereto.

SEVENTH.—That by reason of the employment of the
11 plaintiff aboard the vessel aforementioned, he is entitled to maintain this action against the defendant herein under the provisions of the Jones Act aforementioned.

EIGHTH.—That the plaintiff suffered injuries and illness to his person in the course of his employment aboard the vessel aforementioned.

NINTH.—That the aforesaid occurrence was due solely to the carelessness, recklessness and negligence of the defendant, its agents, servants and employees; the fault, neglect and omission of officers and fellow seamen aboard
12 the vessel; the failure, neglect and omission of the defendant to keep and maintain the aforesaid vessel and its appurtenances in a seaworthy condition and reasonable state of repairs; in defendant's failure to take any means or precautions for the safety of the plaintiff; in failing to provide the plaintiff with a reasonably safe place wherein to work, and in otherwise being careless reckless and negligent in the premises, more particularly in that on or about the 24th day of November, 1945, the plaintiff was caused to become seriously sick, ill and disabled, in that Chinese citizens were taken aboard the vessel without any physical examinations and without any means or precautions taken to safeguard the plaintiff from contamina-

tion or infection and that no sanitary means or precautions were taken for the health and safety of the plaintiff, or any means or precautions taken to prevent contagion aboard the vessel, all of which resulted in the plaintiff becoming sick, ill and disabled, and the defendant was further at fault in failing to provide prompt, adequate and proper medical aid and attendance, nursing care and hospitalization, but caused, allowed and permitted the plaintiff's illness to become active and progressive without taking any means or precautions to check or cure the same, and the defendant was otherwise careless, reckless and negligent in the premises.

TENTH.—That by reason of the foregoing, the plaintiff was caused to sustain severe, painful and permanent injuries to his person, and was incapacitated from attending to his usual duties or vocation, resulting in his suffering a loss of earnings thereby and may be required to incur obligations for medical and surgical aid and attendance and nursing care, and plaintiff was otherwise injured all to his damage in the sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars.

FOR A SECOND CAUSE OF ACTION:

ELEVENTH.—Plaintiff repeats and realleges all of the foregoing paragraphs of the complaint with the same force and effect as if herein set forth at length, and in addition thereto alleges:

TWELFTH.—That it was the duty of the defendant to provide the plaintiff with the expenses of his maintenance and cure.

THIRTEENTH.—That the plaintiff became disabled as heretofore described, but the defendant failed, neglected and refused to supply the plaintiff with the expenses of his

16 *Answer.*

maintenance and cure, all to his damage in the sum of Twenty-five Thousand ($25,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars on the first cause of action and in the sum of Twenty-five Thousand ($25,000.00) Dollars on the second cause of action, together with the costs and disbursements of this action.

17 /s/ BERTRAM J. DEMBO,

BERTRAM J. DEMBO,
Attorney for Plaintiff,
Office & P. O. Address,
220 Broadway,
Borough of Manhattan,
City of New York.

Answer.

UNITED STATES DISTRICT COURT,

18 SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

The defendant above named, by Horace M. Gray, its attorney, answering the complaint herein, alleges:

AS TO THE FIRST ALLEGED CAUSE OF ACTION:

FIRST.—The defendant denies each and every allegation contained in the paragraphs of the complaint numbered *Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth* and *Tenth.*

SECOND.—The defendant denies that the provisions of the statute alleged in paragraph *Sixth* of the complaint are applicable to it herein.

AS TO THE SECOND ALLEGED CAUSE OF ACTION:

THIRD.—The defendant repeats and realleges each and every denial and allegation hereinbefore set forth as though set out herein in full.

FOURTH.—The defendant denies each and every allegation contained in paragraphs *Eleventh* and *Twelfth* of the 20
complaint.

FIFTH.—The defendant denies that it was or is under any obligation to plaintiff by reason of the matters alleged in paragraph *Thirteenth* of the complaint and therefore denies the same.

WHEREFORE, the defendant demands:

1. That the Court grant it judgment dismissing the complaint herein.

2. That the Court award to the defendant its costs and 21
attorney's fees.

3. That the Court award to the defendant such other and further relief as may be just.

HORACE M. GRAY,
Attorney for Defendant,
Office & P. O. Address:
42 Broadway,
New York 4, New York.

22 **Interrogatories Addressed to Plaintiff.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

The defendant, by Horace M. Gray, its attorney, herewith addresses the following interrogatories to the plaintiff to be answered in writing under oath within 15 days after
23 the service of these interrogatories upon you.

1. State the dates upon which the plaintiff claims his employment by defendant as alleged in paragraph fifth of the complaint, commenced and terminated.

2. State at what port the plaintiff claims such alleged employment commenced.

3. State whether the plaintiff claims such alleged contract of employment was oral or in writing.

4. If such alleged contract is claimed to have been in
24 writing (a) attach a true copy thereof to your answers or, if oral, (b) state all the terms thereof and (c) the name of the person claimed by the plaintiff to have acted on behalf of the defendant in entering into such alleged contract.

5. (a) Describe fully all injuries claimed to have been sustained and all illness claimed to have been contracted on board the s/s "Edward B. Haines" as alleged in paragraph eighth of the complaint, and (b) designate which of the same are claimed to be permanent.

6. State as nearly as possible the date or dates when such alleged injuries were sustained and such alleged illness

was contracted as alleged in paragraph eighth of the complaint.

7. (a) Describe the first observed symptom or symptoms of the illness alleged in paragraph eighth of the complaint, and (b) state the date or dates upon which they were so observed.

8. State all acts and/or omissions claimed by the plaintiff to be careless, reckless and/or negligent as alleged in paragraph ninth of the complaint, together with their claimed relationship to the alleged injury and/or illness for which this suit is brought.

9. State what provisions for the safety and protection of the plaintiff he claims should have been taken, but which were not taken, by the defendant as alleged in paragraph ninth of the complaint.

10. State all respects as to which it is claimed that the place where plaintiff was required to work, alleged in the complaint, was not reasonably safe.

11. State what sanitary means and precautions the plaintiff claims were not taken for his health and safety as alleged in the ninth paragraph of the complaint.

12. State as to the Chinese citizens alleged to have been taken aboard the vessel as alleged in paragraph ninth of the complaint (a) the number, (b) sex and (c) approximate ages thereof; (d) the respective dates they are alleged to have been taken aboard, (e) the respective purposes of such visits to the vessel, (f) whether the plaintiff observed any thereof suffering from the illness claimed to have been contracted by the plaintiff as alleged in the complaint and, if so, (g) the conditions observed by the plaintiff upon which such conclusion is based.

28 *Interrogatories Addressed to Plaintiff.*

13. State (a) whether plaintiff reported his alleged injury and/or illness to any one of the officers of the vessel, and, if so, (b) state the names of the persons to whom such report is claimed to have been made and, (c) the date upon which each such alleged report was first made.

14. State (a) whether the plaintiff claims to have made any complaint to any one of the officers of the vessel as to condition which he claims in the complaint caused or contributed to the alleged injury and/or illness complained of and, if so, (b) state the names of all persons to whom all
29 such alleged complaints are alleged to have been made and (c) the respective dates thereof.

15. State (a) whether the plaintiff received any medical aid and attendance for any such alleged injury and/or illness while on board the s/s "Edward B. Haines," and, if so, (b) state when and (c) the character of such aid and attendance so received.

16. (a) State the dates between which the plaintiff claims he was incapacitated as alleged in paragraph tenth of the complaint and, (b) the character of such alleged
30 incapacity.

17. State (a) whether plaintiff has returned to work since the conclusion of the voyage of the s/s "Edward B. Haines" upon which the alleged injury and/or illness is claimed to have occurred, and if he has so returned to work state (b) the dates and places of such return, and (c) the name and address of each employer.

18. State the dates between which plaintiff claims to have been confined (a) to his bed and (b) to his home by reason of the injury and/or illness alleged in the complaint.

Interrogatories Addressed to Plaintiff.

19. State (a) whether plaintiff was treated at any hospital for his alleged injury and/or illness and, if so, (b) state the names and addresses of such hospital or hospitals and (c) the dates between which such treatment was furnished, respectively.

20. State the residence of plaintiff at the time this action was commenced and, (b) the date of his birth.

21. State all amounts, if any, claimed to have been expended or incurred by plaintiff for (a) medical care, (b) nursing, (c) medicines and (d) hospital care, as a result of the alleged injury and/or illness referred to in the complaint.

22. State the plaintiff's vocation and avocation.

Dated: New York, N. Y., June 2, 1947.

HORACE M. GRAY,
Attorney for Defendant,
42 Broadway, Manhattan,
New York 4, N. Y.

To:

BERTRAM J. DEMBO, Esqs.,
Attorney for Plaintiff,
220 Broadway,
New York 7, N. Y.

34 **Answers to Interrogatories.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Plaintiff, answering the interrogatories propounded by the defendant, states and alleges in writing and under oath:

1. July 20, 1945 to December 2, 1945.

35 2. New York City.

3. In writing.

4. Plaintiff signed on articles before a Shipping Commissioner. He does not have a copy of said articles and does not remember the terms of said articles, however, this information should be in the possession of the defendant.

5. Plaintiff suffered paralysis involving his entire body and limbs, including the face and from his neck down, all of which are claimed to be permanent. The plaintiff further suffered an aggravation of a condition commonly known as poliomyelitis, by reason of the defendant's failure
36 to treat, failure to relieve the plaintiff from his duties and failure to provide prompt, adequate and proper nursing care, medical and surgical care and treatment, hospitalization, proper, sufficient and adequate food, water and medication.

6. Plaintiff took sick several days after the Chinese troops and civilians came aboard the vessel, which date of illness to the best of plaintiff's recollection was November 24, 1945.

7. (a) Weakness and dizziness. (b) November 24, 1945.

8. The defendant failed to take any means or precautions to prevent contagion, caused, allowed and permitted

people aboard the vessel without any or sufficient medical examination, supervision or restraint and failed, neglected and omitted to provide plaintiff with prompt, adequate and proper nursing care, cure and treatment, hospitalization, and was further at fault in ordering and directing the plaintiff to continue with his duties after he became ill.

9. The defendant should have provided plaintiff's quarters with adequate screening or other sanitary means to keep flies and bugs out of his quarters, failed to take any means or precautions to keep food in a sanitary condition and precautions against contamination, failed to take 38
any means or precautions to prevent contagion or to prevent people with contagious disease from boarding the vessel, and then upon the plaintiff being rendered sick, ill and disabled failed to provide him with prompt, adequate and proper nursing care and treatment and in addition thereto ordered and directed the plaintiff to continue with his duties instead of relieving him therefrom. Plaintiff's quarters were unsanitary by reason of the flies and bugs as aforesaid and plaintiff's working aboard the vessel was unsafe by reason of his exposure to contagion as heretofore described.

10. See paragraphs 8 and 9.

11. The sanitary precautions which were not taken have 39
already been described.

12. (a) Approximately 150 Chinese troops and 2 or 3 Chinese civilian engineers. (b) All male. (c) The men seemed to be all young, from 17 years up to the twenties. (d) Approximately 10 days before plaintiff became ill. (e) The Chinese troops and civilians were brought aboard as passengers. (f) Yes. (g) Some of the men seemed to walk as if their legs were paralyzed to some extent. A lot of them looked sickly, ill and exhausted. It was obvious, even to a layman that many of the men were not in good health, but were in need of medical treatment.

Answers to Interrogatories.

13. (a) Yes. (b) 1st assistant engineer and purser. (c) Immediately upon becoming ill and several times thereafter up until plaintiff was relieved from his duties. Plaintiff does not recall the dates of reporting his illness, but it was before November 24, 1945, on which day his face became paralyzed and he again reported to the 1st assistant engineer and purser. The plaintiff was not relieved from duty until the following day when the 1st assistant engineer took over his watch and plaintiff went to his cabin and remained there until removal from the vessel on or about December 1, 1945. That while plaintiff was in his cabin, he still was not provided with any prompt, adequate or proper nursing care, cure or treatment, but was left without any attention, medical supervision or treatment, and was not transported to a hospital until December 1, 1945.

14. (a) Yes. (b) 1st assistant engineer and purser. (c) While the vessel was at Tsingtao, China during the month of November, 1945, on several occasions. The complaints were with reference to the unsanitary condition of plaintiff's quarters, the unsanitary condition and manner in which food was handled and the fact that the Chinese troops and civilians who had been brought aboard the vessel were in an unkempt, filthy, dirty and sickly condition.

15. With the exception of some bicarbonate of soda on one occasion, plaintiff received no treatment aboard the vessel.

16. (a) Plaintiff has been incapacitated from the date of his illness up to and including the present time. (b) Plaintiff claims that the incapacity is total and permanent.

17. Plaintiff has not returned to work.

18. (a) Plaintiff was confined to his bed until August, 1946. (b) Plaintiff has been confined to a wheelchair with occasional use of crutches up to and including the present time.

Answers to Interrogatories. 43

19. (a) Yes. (b) & (c) U. S. Fleet Hospital, Tsingtao, China, December 2nd to December 7th, 1945. U. S. S. Repose, December 7th to December 18th, 1945. U. S. Fleet Hospital #103, Guam, December 18th, 1945 to January 1, 1946. A. P. A. U.S.S. Dawson, January 1st to January 17th, 1946. U. S. Marine Hospital, San Francisco, Calif., from January 17th to April 19th, 1946. U. S. Marine Hospital, Staten Island, New York, April 21st to May 9th, 1946. Bellevue Hospital, New York City, May 17th to July 14th, 1946.

44

20. (a) 119 Noble Street, Brooklyn, New York. (b) July 16, 1920.

21. Plaintiff has not been billed for any doctor bills or nursing care.

22. Seaman, holding 2nd assistant engineer ticket on steam, and 3rd assistant engineer on diesel engines. Dated, New York, November 20, 1947.

Yours, etc.,

Bertram J. Dembo, 45
BERTRAM J. DEMBO,
Attorney for Plaintiff,
Office & P. O. Address,
220 Broadway,
Borough of Manhattan,
City of New York.

To:

HORACE M. GRAY, Esq.,
Attorney for Defendant,
42 Broadway,
New York 4, N. Y.

46 **Clerk's Minutes of Trial.**

Feb. 2, 1948

Civil Jury
Room #905
H. J. Hoth

The Court meets and is opened by proclamation.

Present: Hon. ALFRED C. COXE, J.

ROBERT A. MCALLISTER vs. COSMOPOLITAN SHIPPING CO. LTD.

Civil #36/769—Cal. #277

47 APPEARANCES

For the Pltff.—BERTRAM J. DEMBO, by Jacob Rassner and Robert Klonsky

For the Deft.—HORACE M. GRAY and E. R. PHILLIPS

Jury duly impanelled and sworn

1—Miss Elsie Jean
2—Thomas Fogarty
3—Mrs. Miriam Burns
4—Mrs. Mary D. Ryan
5—Mrs. Frances R. Walker
48 6—Manuel Pappas
7—Mrs. Rose Berg
8—Mrs. Florence H. Lehman
9—Mrs. Florence G. Harman
10—Peter C. Devlin
11—William R. Colbert
12—Mrs. Gene Webster

Opening statements

by Mr. Rassner for the pltff.
by Mr. Gray for the deft.

PLTFFS. TESTIMONY

Witnesses

George A. Linnartz, sworn
Patrick E. Napier, sworn

Exhibits

id. #1—Smooth Log Book #1—S. S. Edward B. Haines 7/24/45—9/22/45
id. #2—Smooth Log Book #2—S. S. E. B. Haines 9/23/45—11/22/45
id. #3—Smooth Log Book #3—S. S. E. B. Haines 50
11/23/45—1/22/46
4—Accident Report—date sent 12/28/45 (illness contracted 11/24/45)

(*Defts. Exhibits*)

A—Photo copy (duplicate) Shipping Articles—S. S. E. B. Haines—5 sheets 7/23/45
id. B—Accident Report—date sent 12/28/45 re: R. A. McAllister (illness contracted)
C—Memo. 12/1/45 re: R. A. McAllister 1st Lt. admission to Div. #1, Field Hospital Marine Division for diagnosis and treatment—(signed) Lt. Comm. 51
D. J. Gioigio

Court and Trial adjourned to Feb. 3, 1948—10.30 A. M.

Feb. 3, 1948

Civil Jury
Room #905
H. J. Hoth

52 *Clerk's Minutes of Trial.*

The Court meets pursuant to adjournment and is opened by proclamation.

Present: Hon. ALFRED C. COXE, J.

ROBERT A. MCALLISTER VS. COSMOPOLITAN SHIPPING CO. LTD.

Civil #36/769—Cal. #277

Continued from Feb. 2, 1948

PLTFF. TESTIMONY

Witnesses

53 Patrick E. Napier, resumes
Fred A. Benz, sworn
Robert A. McAllister, sworn
(Dr.) Samuel Frant, sworn
called out of turn by consent as an accommodation.

Exhibits

#5—Medical History (2 pp.) Abstract (1 p.) U. S. Fleet Hospital #103—16 pp. attached and 1 Green Card from The Medical Officer in Command to Lt. (jg) Robert A. McAllister

54 #6—Abstract from Clinical Record re:—R. A. McAllister
#7—Clinical Record—Brief—U. S. Marine Hospital, Stapleton, S. I. re: Robert Allister—Register #165381

Court and Trial adjourned to Feb. 4, 1948—10.30 A. M.

Feb. 4, 1948

Civil Jury
Room #905
H. J. Hoth

Clerk's Minutes of Trial. 55

The Court meets pursuant to adjournment and is opened by proclamation.

Present: Hon. ALFRED C. COXE, J.

ROBERT A. MCALLISTER vs. COSMOPOLITAN SHIPPING CO. LTD.

Civil #36/769—Cal. #277

Continued from Feb. 3, 1948

PLTFFS. TESTIMONY

Witnesses

56

Robert A. McAllister, resumes
(Dr.) John A. DiFiore, sworn
called out of turn by consent as an accommodation
John Brodowski, sworn

Exhibits

#8—Stip 1/28/48 before Hon. John C. Knox, D. J. re: McAllister vs. Cosmopolitan
Motion by pltff. to strike etc.—Motion Denied

DEFTS. EXHIBITS

D—Engineer's Log Book ( ) from 10/18/45 to 12/26/45—S. S. Edward B. Haines Voyage #7 57

id. E—Engineer's Log Book—(Permanent Record) from 10/18/45 to 1/31/46—S. S. Edward B. Haines Voyage #7

F—Letter 7/18/46 to Dear Sir (Mr. Crandel) from Robert A. McAllister

Court and Trial adjourned to Feb. 5, 1948—10.30 A. M.

Feb. 5, 1948

Civil Jury
Room #905
H. J. Hoth

58 *Clerk's Minutes of Trial.*

The Court meets pursuant to adjournment and is opened by proclamation.

Present: Hon. ALFRED C. COXE, J.

ROBERT A. MCALLISTER vs. COSMOPOLITAN SHIPPING CO. LTD.

Civil #36/769—Cal. #277

Continued from Feb. 4, 1948

PLTFFS. TESTIMONY

Witnesses

59

(Sister) Elizabeth Kenny, sworn
Floyd Bullis, sworn
William B. McLeod, sworn
Pltff. rests subject to calling two more witnesses.
Deft. moves to strike testimony etc.—Denied
Deft. moves to dismiss 1st cause of action—Denied
Deft. moves to dismiss 2nd cause of action—Denied

DEFTS. TESTIMONY

Witnesses

Harold E. Wright, sworn
60 Edward R. Phillips, sworn
William J. Darcy, sworn

Exhibits

(Carbon Copy)
G—Original Counterpart of Sworn Agreement re: S. S. Edward B. Haines contract WSA-3165—(16 pp.)
H—Letter 2/12/44 to Cosmopolitan Shipping Co. Ltd. from T. J. Kiener subject: S. S. Edward B. Haines

Court and Trial adjourned to Feb. 6, 1948—10.30 A. M.

Clerk's Minutes of Trial. 61

Feb. 6, 1948

Civil Jury
Room #905
H. J. Hoth

The Court meets pursuant to adjournment and is opened by proclamation.

Present: Hon. ALFRED C. COXE, J.

ROBERT A. MCALLISTER vs. COSMOPOLITAN SHIPPING CO. LTD.

Civil #36/769—Cal. #277 62

Continued from Feb. 5, 1948

DEFTS. TESTIMONY

Witnesses

(Dr.) Phillip M. Stimson, sworn
(Dr.) Robert Ward, sworn
(Dr.) Beverley Chaney, sworn
Jack Moxhay, sworn

Deft. rests—Pltff. rests for purposes of motions—No motions made, motions postponed to Monday Feb. 9, 1948.

Excerpts from Dep. Norman Randell, read into the record, in the absence of the jury. 63

Court and Trial adjourned to Feb. 9, 1948.

Feb. 9, 1948

Civil Jury
Room #905
H. J. Hoth

The Court meets pursuant to adjournment and is opened by proclamation.

64 *Clerk's Minutes of Trial.*

Present: Hon. ALFRED C. COXE, J.

ROBERT A. MCALLISTER VS. COSMOPOLITAN SHIPPING CO. LTD.

Civil #36/769—Cal. #277

Continued from Feb. 6, 1948

DEFTS. TESTIMONY

Pltffs. Witness

Robert A. McAllister, resumes

65 *Defts. Rebuttal Witness*

Norman Randell, sworn

Pltffs. Exhibit

#9—Agreement by between National Marine Engineers Beneficial Assn. and the Cosmopolitan Shipping Co. Inc. dated April 6, 1945—13 pp.

Pltff. rests—Deft. rests—Both sides rest.

Deft. moves dismissal of complaint—Motion denied.

Deft. moves court direct verdict for the Deft. on both causes of action.

66 Motion denied—Defts. motion for directed verdict—Denied.

Pltff. moves for directed verdict for the Pltff.—Motion denied.

Deft. moves for dismissal of 1st count—Motion denied.

Deft. moves for dismissal of 2nd count—Motion denied.

Deft. moved for a mistrial—Denied.

Summations by counsel—Charge by the Court—Officer sworn—Jury retires at 2.18 P. M. and return at 8.47 P. M. with the following verdict:

For the Pltff. on count #1 in the sum of $100,000.00.
For the Deft. on count #2.

All motions reserved.

Court adjourned to Feb. 10, 1948—10.30 A. M.

Testimony.

UNITED STATES DISTRICT COURT, 68

SOUTHERN DISTRICT OF NEW YORK.

ROBERT A. MCALLISTER, *Plaintiff*, v. COSMOPOLITAN SHIPPING COMPANY, INC., *Defendant*.	Civ. 36–769.

Before: Hon. ALFRED C. COXE, D. J., and a Jury. 69

New York, February 2, 1948, 10:30 a. m.

APPEARANCES:

BERTRAM J. DEMBO, Esq., Attorney for Plaintiff; Jacob Rassner, Esq., of Counsel.

HORACE M. GRAY, Esq., Attorney for Defendant.

(During the impaneling of the jury the following occurred:)

70 *George A. Linnartz—Direct.*

Mr. Rassner: I believe that challenge for cause would lie here.

The Court: No, I deny that.

Mr. Rassner: Mr. Lyons, you made a statement you might feel prejudiced. I would like to know the reason.

The Talesman (Mr. Lyons): Why I would be prejudiced?

Mr. Rassner: Yes.

The Talesman: Well, I served on an accident case last week—I don't know why. I wouldn't like to say why
71 I would be prejudiced. I feel Mr. Rassner's work last week didn't prove anything to me. I don't think I would serve fairly in this case—I don't think I would be a good juror in this case.

The Court: All right, I will take you at your word.

(Talesman No. 7 excused.)

(Impaneling continued. Jury sworn.)

The Court: All right, You may open.

THE PLAINTIFF'S CASE.

72 GEORGE A. LINNARTZ, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Rassner:

Q. Mr. Linnartz, what is your business or occupation? A. I am a merchant seaman.

Q. How long have you been a merchant seaman? A. I am beginning my fourteenth year.

Q. Do you hold any licenses? A. Yes, chief mate.

Q. And how long have you been holding the chief mate's license? A. March will be four years.

Q. What type of vessels? A. Any vessel.

Q. Any sized vessel? A. Any size vessel.

73

The Court: Since when have you held a chief mate's license?

The Witness: Since March 1944.

The Court: All right.

Q. What waters? A. Any waters.

Q. What Government has issued that license to you? A. United States Government.

Q. Back in 1945, by whom were you employed? A. Cosmopolitan Shipping Company.

Q. In what capacity?

74

Mr. Gray: That is objected to. It calls for a conclusion of law, and I think the contract of employment should be offered in evidence.

The Court: I will let him testify.

Mr. Gray: Exception, please.

Q. In what capacity? A. As chief officer.

Q. And where were you employed? A. In New York, in the Cosmopolitan office.

Q. When? A. I was employed the voyage before we sailed for Shanghai. It was probably in April or May.

75

Mr. Gray: That is objected to because the only voyage involved here is this voyage, and I think in fairness to everybody we should have the articles in evidence themselves.

The Court: I will let him testify in his own language. When you were first employed, was it on the voyage prior to this particular one?

The Witness: Yes. I had two voyages.

Q. Will you tell us the method by which you were employed? A. Well, I was telephoned at my home by, I believe, Mr. Moxey, the shipping agent.

Q. The shipping agent for whom? A. The Cosmopolitan. And he asked if I want a chief mate's job on the Haines. I said "Surely, I will take it."

Q. Where did you go? A. I went to the Cosmopolitan office and received a medical slip to go down to the doctor, and went down—

Q. Who gave you the medical slip? A. Mr. Moxey, the personnel manager.

Q. What happened after that physical examination? A. I reported to my ship for duty.

Q. Was any other employer mentioned to you? A. No, not to my knowledge.

Q. As far as you know, did anybody ever mention anybody to you but Cosmopolitan as your employer? A. No.

Q. Was Cosmopolitan the people you were dealing with? A. Yes, sir, they were the ones that paid me.

Q. And you got your pay from Cosmopolitan? A. That is correct.

Q. Now getting down to the voyage on which Mr. McAllister was employed, was he employed on the first voyage with you? A. No.

Q. Was he employed on the one in which the vessel went to Shanghai? A. Yes, he was.

Q. Where did the ship sail from? A. From New York.

Q. Is that the first time you met Mr. McAllister? A. That is the first time I met him.

Mr. Rassner: May I have the logs, please?

Q. I show you this book and I ask you if this is the deck log of the voyage in question? A. Yes, sir, it is.

Mr. Rassner: I offer it in evidence.

Mr. Gray: I point out to the Court that all the dates in here are 1946, and I object to this log going in as the log of the voyage.

Mr. Rassner: I ask for the production of the log, invoiving this voyage.

I offer this log in evidence.

The Court: Why not have it understood that it only covers the dates that are applicable to this particular action. That will eliminate all the rest of it. You can pick it out some other time.

Mr. Gray: There should be three logs in as the log of the voyage up until the time Mr. McAllister left the ship. They are all marked here clearly. He has picked out No. 3. He should have 1 and 2 also 80
in.

Mr. Rassner: I will take a look at 1 and 2 and have them—

The Court: Can't you mark them all for identification?

Mr. Rassner: May I accept your Honor's suggestion. I think it is excellent.

I offer the three logs for identification.

(Marked Plaintiff's Exhibits 1, 2, and 3 for identification.)

Q. Tell us what type of vessel this was? A. It is a 81
Liberty ship.

Q. Can you give us the dimensions? A. It is about 441 or 442 foot long approximately. It has a beam of 57 foot. 57 foot wide. Gross Tonnage of about 71, 76 tons.

Q. How many crew did she carry? A. I think it was 41 including the master.

Q. Where did she sail from? What American port? A. From New York.

Q. Now I would like to have that date. You might use the logs to refresh your recollection if you like?

The Court: Well, let him see it. He probably wrote it in his own handwriting.

82 *George A. Linnartz—Direct.*

Mr. Rassner: Yes. I want to get the one before this.

The Court: As a matter of fact it doesn't give much information during the period of war. I understand the deck log was kept so you couldn't see it.

Mr. Rassner: This was after the war that this incident took place.

Mr. Gray: Not at the beginning. They left in July.

Q. Can you tell us when the voyage started? A. July
83 24, 1945. That is, this particular voyage.

Q. From which port? A. The port of New York.

Q. What was your first port of call? A. First port of call was Suez. We were passing through the Suez Canal.

Q. Tell us what route you took and how long it took before you got to Shanghai? A. We sailed from New York, went across the Atlantic through the Mediterranean, through the Suez, Red Sea, Gulf of Aden, on down to Colomobo and Ceylon. There we stopped for stores and fuel. From there we went to Singapore, Singapore to Hong Kong, and Hong Kong to Shanghai.

84 Q. Will you tell us when you got to Shanghai?

Mr. Gray: He hasn't finished.

A. I believe we got to Shanghai on the 29th if I am not mistaken. I don't recall the dates (after referring to book): This is just to Hong Kong. It would be in book 2. Arrived Shanghai on the 26th, 8:45 p. m.

The Court: 26th of what?

The Witness: Of September. September 26th, 1945, sir.

85

Q. Tell us what sanitary measures, if any, were taken when you got there? A. Well, in Shanghai, when we finally got to the dock, we were—well, I did what I could. We got Chinese coolies aboard the ship, working.

Q. First I would like to know about what information, if any, you got as to the health conditions at Shanghai?

Mr. Gray: That is objected to as calling for hearsay, and if there were any health conditions there it can be proved by local records.

The Court: Overruled.

Mr. Gray: Exception, please.

86

A. We received—rather, the captain gave the purser orders to post up these notices, stating that there was epidemics of polio or infantile paralysis and cholera and influenza and dysentery.

Mr. Gray: That is objected to.

The Court: Did you hear that, or where did you get this information from?

The Witness: The captain had it posted on a notice. I imagine he got it from the authorities ashore.

87

Mr. Gray: That is objected to.

The Court: Objection sustained. Strike it out.

Mr. Gray: And I also object to what was on this notice because the notice itself is the best evidence.

The Court: That is true, unless he can account for its non-production.

Q. Did you have a conversation with the master about these notices? A. No, I didn't, not with him himself. After I saw them posted and everything I spoke to him about it.

Q. Right there, tell us what you said to the master about the notices and what he said to you.

88 *George A. Linnartz—Direct.*

Mr. Gray: That is objected to.

The Court: Objection sustained. You are getting a little ahead of your story. You said you saw some notices posted on the ship. Tell us about those, where you saw them, when?

The Witness: These notices were posted in all the mess rooms where the crew generally congregate about the ship, and they stated there were epidemics ashore, about dysentery and cholera and influenza—there was a list. They advised us if we did go ashore not to eat in public places but to eat at the
89 Red Cross clubs, United States seamen clubs, and Army clubs, and generally to stay away from the coolies because they were contaminated.

Q. You had a conversation with the master? A. Yes.

Q. When with reference to the arrival of the vessel at the dock? Within how long a period of time after she arrived? A. Probably the same day. I can't quite remember.

Mr. Gray: That is objected to. It is too indefinite and calls for hearsay testimony.

90 The Court: You had a talk with the master some time?

The Witness: After the arrival at Shanghai.

Q. Is that when you had a talk with the master? A. Yes, after we arrived at Shanghai.

Q. How long after? A. Probably the same day we got to the dock. I can't remember that.

Q. We are not asking you for an exact hour. A. Say the day we got to the dock.

Q. That is your best recollection? A. Yes.

Q. Where did this conversation take place? A. On the bridge.

Q. What did he say to you and what did you say to him?

91

Mr. Gray: That is objected to, as calling for hearsay.

The Court: Overruled.

A. He said, "Well, mate, we have these epidemics here. Let's see if we can't keep these Chinamen out of the quarters as much as possible and keep them outside, and you be sure to talk to your boys when they go ashore to take good care of themselves and generally follow the instructions on these sheets that were posted."

Q. Was any particular epidemic mentioned by the master? A. Well, he mentioned polio and cholera.

92

Q. Did you give any orders personally to the members of the crew? A. Yes, I spoke to them.

Q. When did you speak to the crew?

Mr. Gray: I object to this and ask to have it stricken out as not evidence that such epidemics actually existed in Shanghai.

The Court: There isn't anything to show as yet.

Mr. Rassner: I take exception to that comment. It is information given by the master and I believe that is proof and it is binding on the defendant.

The Court: He has put in a group of diseases, a great many diseases that he says may have been or were ashore.

93

Q. Tell us what was said by the master to you with reference to poliomyelitis, if anything

Mr. Gray: That is objected to. The master is incompetent to discuss poliomyelitis.

The Court: I will let him tell what was said.

I understand your testimony to be that there was a notice posted in the messrooms where the men congregated, stating there were a great many diseases ashore, such as influenza, dysentery, poliomyelitis,

94 cholera; and I understand you to say the master said there were a great many diseases and suggested if possible that the men should be kept on the ship instead of on shore; that is what your testimony was, was it not?

The Witness: Well, not that they couldn't go ashore, because he did give them shore liberty. But it was the places he did not want them to go to.

Q. May we have an answer as to what, if anything, was said to you by the master about polio? A. He said
95 polio was a pretty serious thing and there was an epidemic there and see if I can to the best of my ability keep the Chinamen away from us as much as possible.

Mr. Gray: I ask to have it stricken as not evidence of the existence of polio.

The Court: I will let it stand.

Q. What did you say to your men with reference to polio? A. I told them, I said, "Well, boys, there is an epidemic of polio here. You boys want to be careful when you go ashore stay out of these Chinese restaurants. Go
96 to the clubs." There was a United Seamen's Service Club and a Red Cross Club, places where they could eat.

Q. Was it common knowledge that polio was raging in town?

Mr. Gray: That is objected to.

The Court: Objection sustained.

Q. Tell us what was the general knowledge—

Mr. Gray: Objection.

The Court: Objection sustained.

Q. What do you know about it? A. There was talk among everyone that there was polio around the place.

Mr. Gray: That is objected to. I ask to have the answer stricken out.

The Court: Objection sustained.

Q. After you received the information from the master that there was a polio epidemic in town, did you take any precautions to keep civilians or people from town off the vessel? A. Those that were not authorized to come aboard, yes, but there were so many that were authorized.

Q. Authorized by whom? A. By the master. They have to have his permission to come aboard and load cargo.

Q. Tell us who was authorized to come aboard from the 98
shore? A. Well, there was stevedores working the cargo.

Q. How many? A. There must have been about twenty to twenty-five to each hold, and that would be 125 of them.

Q. What would they be, coolies? A. They would be coolie labor, yes, Chinese coolies. They worked the cargo. And then we contracted some Chinese to work aboard the ship painting decks.

Q. How many of those? A. 25 or 30 of those.

Q. Was that also with the master's consent and permission? A. That is right.

Q. Who else was permitted to go aboard the ship? A. You mean while we were in Shanghai? 99

Q. That is right. A. Well, they brought these passengers aboard.

Q. How many? A. I can't recall how many there was but there were truck drivers and mechanics.

Q. Would the log show you? A. Yes, the log would show.

Q. Would you mind looking at it and tell us when and approximately how many people were brought on board ship while the vessel was in Shanghai? Will you go right through it? Right from the day you got there, and give us each date and the number? A. It will be in that log-book. This only goes to September. This isn't the right one.

100 *George A. Linnartz—Direct.*

Q. Will you look under date of November 23rd, please? A. Right here. This is the day we left Shanghai, going to Hong Kong—oh, no, going to Tsingtao. We left on the 23rd of November at 10:40. What I want to find out is how many Chinamen we did have aboard.

Q. Have you got the October log there? A. Yes, it is in there. I will find it now.

Well, the stevedores started coming aboard—that would be at one o'clock on November 13th. That would be the first day they were aboard.

101 By the Court:

Q. Are you talking about stevedores now? A. Well, this is Chinese that were aboard the ship. That is what he asked me.

Q. You were talking about passengers, including truck drivers. What are you talking about now, stevedores, passengers, truck drivers, or what? A. Which do you want?

Q. I will leave it to you. It isn't what I want.

By Mr. Rassner:

102 Q. Suppose you tell us who they were, and the number? A. I can't give you the exact number of stevedores but there were five gangs each day. That would be the 13th, 14th of November.

Q. And how many men would be in a gang? A. There would be 25 to a gang.

Q. There would be 125 Chinese coolies acting as stevedores? A. That is right.

On the 15th they were aboard and on the 16th there was three passengers came aboard.

Q. Were those Chinese passengers? A. Chinese passengers, yes. The log doesn't seem to have a very accurate—on the 15th there was three. I can't seem to find it in here right now, but there was truck drivers for each

of the trucks and mechanics. I would say roughly with the passengers and the truck drivers there was about 100 or 125 aboard the ship to go to Tsingtao.

Mr. Gray: That is not responsive.
The Court: I will let it stand.

Q. What were the dates when these people came aboard? During what period of time? A. From the 13th of November through the 23rd.

Q. Now where was the vessel on the 13th of November? A. In Shanghai. 104

Q. Where was she on the 23rd? A. In Shanghai.

Q. Was she in Shanghai during that entire length of time? A. Yes.

Q. Now, during that time how many people came from ashore to the ship? A. Well, there was stevedores aboard.

Q. Approximately how many altogether, passengers and workmen? A. Say about 125 stevedores and then the passengers another 125.

Q. You say about 250 people were brought aboard the ship? A. Yes.

Q. Were there any other people on board ship? A. Yes. 105

Q. Who? A. Peddlers all over the ship.

Q. How many peddlers? A. Each day at least 20 or 30 of them around.

Q. Was that with the permission of the master? A. Yes.

Q. Could they go on board the vessel without his permission? A. No.

Q. What physical examination was made of these people? A. To my knowledge, none.

Q. Was there a doctor aboard ship? A. No.

Q. Are you familiar with the United States regulations

106 as to having a doctor aboard that ship when passengers are carried? A. No.

Q. What is that regulation?

Mr. Gray: That is objected to.

The Court: Yes.

Mr. Rassner: I will ask your Honor to take judicial notice, and I will hand it up to your Honor in transcript.

107 Q. At any event, you knew there was a regulation that prohibited—

Mr. Gray: That is objected to.

The Court: Yes.

Q. Was there a doctor aboard this ship? A. No.

Q. Were there any facilities for medical examination or treatment aboard the ship? A. Only our ship's purser. That was all.

Q. He was not a doctor? A. No.

Q. No doctor was aboard the ship during that time? A. No doctor was aboard the ship during that time.

108 Q. No physical examination was made of any man who boarded the ship? A. Not to my knowledge.

Q. You were the first mate? A. Yes.

Q. You were with the ship all that time? A. I was aboard the ship all that time, yes.

Q. If a doctor was provided you would know about it? A. That is right.

Q. And as far as you know, no doctor was provided? A. That is right.

Q. By whom is a doctor provided when a doctor is provided?

Mr. Gray: That is objected to as speculation.

The Court: Sustained.

Q. Is there an established custom and usage in the trade as to who provides a doctor?

Mr. Gray: That is objected to.
The Court: Sustained.

Q. In any event, you had these 250-odd people and you say there was no doctor aboard. Now what toilet facilities were there for these people? A. Carpenters came aboard and built a wooden toilet on the deck, sort of a trough affair.

Q. What do you mean by that? A. It was a wooden 110 shed and had a trough where the men could sit, and it led over the side of the ship and was hosed by the seamen.

Q. Right over the ship? Is that where the feces went, through the open and right down into the water? A. That is correct.

Q. And those were the facilities provided for 250-odd people? A. We didn't have the 250 with us on the trip; we had 125 with us on the trip that actually stayed aboard the ship going to Tsingtao.

Q. That was the facilities? A. Yes.

Q. And while you had 250 people aboard those were the facilities provided? A. That is right. 111

Q. Now was there any hospital aboard the ship, a portion of the ship set aside as a sick bay or hospital? A. For the use of the crew, yes.

Q. Was there any for the passengers? A. No.

Q. None at all? A. None at all.

Q. Now, what drinking water was there aboard the ship? What facilities for drinking water? A. Well, we had a drinking fountain, ice water.

Q. How many fountains did you have aboard that ship? A. Just one.

Q. Where was that located? A. In the main deck and passageway.

112 *George A. Linnartz—Direct.*

Q. Who used that? A. Everyone. All hands.

Q. When you say everyone, do you include the 250 men that came from shore? A. Yes.

Q. Do you include the peddlers? A. I imagine they—

Q. We don't want you to imagine. A. Yes, they did.

Q. And did the crew have to use the same drinking fountain that they used? A. They did.

Q. And did they? A. Yes, sir.

Q. Now the crew had their own toilets and toilet facilities? A. Yes.

113 Q. Did you ever see any of the people who came from shore using the toilet facilities? A. Yes.

Q. Was that a rare incident or was that a customary practice? A. I tried to prevent it but you could not stop it. Once you turn your back they are in there again.

Q. There were no locks or anything—at least they were not provided at the time? A. They were not provided. You wouldn't have enough keys.

Q. So the crew's toilet facilities were used by the 250-odd people? A. Whenever they had a chance to slip in.

Q. And you have seen that on frequent occasions yourself? A. Yes, I did.

Q. Did you call this condition to the attention of the
114 master? A. Yes.

Q. Now, how about the cooks? Were they local people or were they people that had come along with the vessel? A. Well, we had our own cooks, yes, from New York here, that came aboard ship.

Q. Did you supplement that? Did you add to it? A. Yes, when we had the troops aboard.

Q. How many men did you add? A. There was two Chinese cooks.

Q. Where did you get them from? A. From Shanghai.

Q. What facilities did they use? Did they use the same cooking utensils and handle the same food that the other cooks did? A. Yes, sir, they used the same kettle.

115

Q. They were not segregated? A. No.

Q. And it was by reason of the passengers you were carrying you needed the additional cooks? A. Yes.

Q. And that was the only purpose for which they were added? A. Yes.

The Court: When you talk about passengers do you mean soldiers, or were the soldiers passengers, or what?

The Witness: Yes, the soldiers were passengers, coolie soldiers.

116

Q. There were also civilian passengers? A. Yes.

Q. Do you know about how many civilian passengers you carried? A. There was about 30 or 35.

Q. Is that your best recollection, between 30 and 35 civilian passengers? A. That is right.

Q. Getting down to McAllister, did you ever know Mr. McAllister before he joined this vessel? A. No, I did not.

Q. Was he a particular friend of yours? A. No.

Q. Was he ever a particular friend of yours? A. No.

Q. And was your relationship always that of a chief mate and a member of the crew? A. Yes.

Q. And that was the only relationship? A. Yes.

117

Q. You have no personal interest in him? A. That is right.

Q. You are under subpoena by my office? A. That is right.

Q. When did you first observe anything unusual about Mr. McAllister?

Mr. Gray: That is objected to as too indefinite?

The Court: I will let him testify.

A. Two or three days before we left Shanghai.

Q. Where was the vessel at the time? A. In Shanghai.

Q. Tell us what you observed at that time?

The Court: That would be when? November 21?

The Witness: Something like that. I don't quite remember the dates.

The Court: You said you left on the 23rd.

The Witness: We left. On the 21st of November I had heard that he was—

Mr. Gray: That is objected to, what he heard.

The Court: Yes.

The Witness: Well, he was sick and I went to visit him and I found him—well, he was complaining
119 of a stiff neck and his arms and legs were stiff and he said he just didn't feel good. I said, "Can I do anything for you?" He said, "No, go ahead, I will be all right."

The next day before we left the dock it is my duty to check the crew and I went looking around for the crew and I asked them where he was, where was McAllister. Well, he was in bed.

Mr. Gray: That is objected to. This is hearsay.

The Witness: Anyway, McAllister was in bed.

The Court: Next day?

The Witness: That was the 22nd, the date we left dock, I believe. I asked him how he felt. He
120 said he didn't feel good, his neck and legs.

Mr. Gray: I object to all this. It is all hearsay and not binding on us.

The Court: I will let it stand.

The Witness: Anyway, I just spoke to the first assistant about it.

Q. What did you say to the first assistant?

Mr. Gray: That is objected to.

Mr. Rassner: I submit this is an order from one of the chief officers and it is binding.

Mr. Gray: This is wholly—

121

The Court: It is all hearsay.

Mr. Rassner: No; it is what he said, the orders he gave.

Mr. Gray: But it has no relevancy in this case. It is irrelevant.

Mr. Rassner: That is not the nature of the objection. The question of relevancy is another matter.

The Court: I will take it subject to a motion to strike it out.

122

Q. What did you say to the chief officer and what did he say to you? A. This is to the chief engineer. I told the first assistant, "McAllister is in a pretty bad way."

Q. Who was the first assistant? A. Mr. Bullis.

Q. Is he in court today? A. Yes.

Q. Was that Mr. McAllister's immediate superior? A. That is right.

Q. What did you tell him and what did he tell you? A. I told him McAllister is in a pretty bad way, "Do you think he will be able to do his work?" He told me, "Go in and see him." That is about as far as my authority would go.

123

Q. Did you speak to anybody else? A. I spoke to the chief engineer and I spoke to the captain.

Q. What was the conversation you had with the chief engineer?

Mr. Gray: My objection to this too, your Honor.

The Court: I will admit it.

A. I just told the chief just the same as I did Bullis, McAllister didn't look any too good, didn't feel good.

Q. When was that? A. That was the day we left the dock.

Q. About how many hours? A. Two or three hours before we sail I usually collect the—

124 Q. When was that, this conversation? A. About four or five hours before we left the dock.

Q. When did you talk to the master about Mr. McAllister for the first time? A. I spoke to him the day before.

Q. That would be two days before you left Shanghai? A. That is right.

Q. Where was the master at the time of the conversation? A. He was on the bridge.

Q. And about what time of the day was it? A. Sometime in the morning.

125 Q. That is your best recollection? A. That is my best recollection.

Q. Give us the best recollection you have as to what you said to the master and what the master said to you? A. I told him "I was down to see McAllister and he doesn't look too good to me, they claim he has got a stiff neck and he is kind of stiff all over, he is sick. You can't do anything for him; he won't let you do anything for him. Don't you think we ought to get a doctor to look at him or send him ashore?"

Q. Did the master ask you what was the matter? A. Yes, sir.

126 Q. What did you say? A. I said it looked paralyzed.

The Court: What?

The Witness: Like he was getting paralyzed.

Q. At that time were you aware there was polio—

Mr. Gray: That is objected to.

A. Yes.

Q. Why were you aware? What were the conditions at Shanghai? A. Yes.

Q. What were the conditions? A. There was an epidemic.

127

Mr. Gray: Of what?
The Witness: Of polio.
Mr. Gray: I object.
The Witness: Polio.
The Court: I will let it stand.

Q. Did you discuss that when you were discussing McAllister with the captain?

Mr. Gray: That is objected to as leading.
The Court: Yes, sustained.

128

Q. What did you discuss with the captain? A. Just discussed about McAllister and the fact that he may have polio.

Q. Will you tell us exactly what you said? A. Just told him that McAllister was down there in a pretty bad condition, didn't we think we should send him to a doctor?

Q. Did you tell him what you thought McAllister had? A. I told him he looked like he was going to be paralyzed or something because everything was stiffening up on him.

Q. And at that time did you have in mind the conditions prevailing? A. Yes.

Q. And did you suggest that to the master?

129

Mr. Gray: That is objected to as leading.
The Court: Yes.

Q. What did the master say? A. He said he would see if he couldn't get a doctor for him and do something for him.

Q. Did he get a doctor? A. No.

Q. Was there a doctor available? A. Yes, there was.

Q. Where was the doctor that was available? A. Well, there is Army doctors ashore across the river.

Q. How far away from the ship? A. Just a couple of miles, just across the river.

130 Q. Why do you say there were Army doctors? A. An Army ship was in the harbor and there were Army doctors ashore because we had sent some boys over to a clinic.

Q. So you had actually used the facilities of the Army doctors that were ashore? A. Yes.

Q. Was there a U. S. camp there? A. That is right.

Q. And that is where you had already sent boys for treatment? A. That is right.

Q. Do you know the nature of the diseases they were sent for? A. I think it was mostly venereal.

131 Q. In any event, they accepted those boys and treated them? A. That is right.

Q. Was there any reason why Mr. McAllister couldn't be sent there? A. No.

Q. You say there were some hospital ships in the harbor? A. Yes.

Q. Did they fly an American flag? A. Yes.

Q. How many were there? A. There was one Navy and one Army.

Q. What is the name of the Navy ship? A. The St. Olaf. The Repose was anchored in the river and the St. Olaf was in the dock ahead of us.

132 Q. Would it have been a simple matter to have Mr. McAllister transferred to any one of those ships? A. Yes.

Q. Were the facilities available to you? A. Yes.

Q. Did you discuss that with the master? A. No.

Mr. Gray: That is objected to as leading.

The Court: He said no. I will let it stand.

Q. In any event did you have the authority to call a doctor from either ship or from shore to see Mr. McAllister? A. No, not unless the master was there.

Q. Did the master have authority? A. Yes.

Q. Was there anything to prevent him from doing that? A. Not that I know of.

133

Q. Did he call anybody from the ship or from the base? A. Not to my knowledge.

Q. And if he had called, then you would have known about it? A. Yes.

Q. The day of departure, whenever the day you departed was, from Shanghai, did you have a conversation with the master again? A. Yes.

Q. Now tell us what that conversation was? A. Well, it was about McAllister.

The Court: When was this?

134

The Witness: Four or five hours before we sailed.

Mr. Gray: I thought he had already testified about that.

The Court: I thought so. He talked about two days before and also about just before.

Q. Now tell us about what the exact conversation was just before you sailed. I withdraw the question.

I have reference to four or five hours before you sailed. What did you say to the master and what did he say to you?

Mr. Gray: That has already been testified to, your Honor. I object to it as repetitious.

135

The Court: I will let him testify.

A. Well, I said I had checked the crew and I had seen McAllister. I said, "All hands are aboard. We are ready to leave the dock." And I said, "McAllister is pretty sick."

Q. Did you tell him what you thought was wrong with him? A. Yes.

Q. What did you tell him and what did he tell you? A. I told him I thought he was getting paralyzed and I thought he was getting polio.

The Court: That is the same thing.

Q. What did the master say? A. The master said he would see if he can get a doctor and look into it.

Q. Is that the last time you spoke to the captain before you sailed? A. Yes.

Q. Was McAllister taken off the ship? A. No.

Q. Did you see McAllister that day? A. I saw him at night after we sailed.

Q. What did he look like then? A. The same.

Q. What was he complaining of?

137 Mr. Gray: I object.

The Court: Yes.

Q. What did you observe?

Mr. Gray: I object.

The Court: Sustained unless it is later.

Mr. Rassner: This is later.

The Court: After the ship sailed?

Q. Yes. What happened then after the ship sailed? A. Well, I stopped by his room to see how McAllister was, ask him how he felt, ask him if I can do anything for him.
138 He seemed to have a stiff neck.

Mr. Gray: That is objected to.

Q. Is that the way it appeared to you? A. That is—

Mr. Gray: Just a minute. That is objected to. How can he say the man has got a stiff neck?

The Witness: From the way he was moving. He was laying in bed.

Mr. Gray: I ask to have it stricken out.

The Court: I will let it stand. It may be a subjective symptom. I don't know.

A. (Continuing) He was in bed. He had a little difficulty moving around in bed. I asked him if there is anything I can do for him. He said "No, I will be all right."

Q. Did you continue visiting Mr. McAllister? A. Every time I was not too busy.

Q. How many times would that be? A. About once or twice.

Q. How long did this continue? A. We went on up to Tsingtao.

Q. How long a trip was that? A. Just a few hours; about a day and a half. We anchored there about the 25th 140
I believe it was. A couple of days after we left Shanghai. Well, McAllister was not much—still wasn't any better then.

Mr. Gray: Objected to as calling for a conclusion of the witness. He said McAllister didn't feel any better then.

The Court: I will let it stand.

Q. When did you observe that? A. I observed that he was getting worse.

Q. In what way? Would you describe it to us? A. He didn't seem he was talking like he should. It seemed 141
he was having trouble speaking. He had trouble moving around the bed. He never came down to eat any more. He didn't look good. He just looked sick, very sick.

Q. He was lying in his bunk all the time? A. In his bed, yes.

Q. Was anybody bringing him any food? A. Not unless the messman did. I don't believe he wanted anything.

Q. Did you offer to bring him food? A. I have offered to bring him food.

Q. What did he say? A. He said he didn't want anything.

Q. How long did he continue in his bunk before he was taken off the ship? A. Well, he went off on the 1st.

142 *George A. Linnartz—Direct.*

Mr. Gray: The first of what? That is objected to. Ask him the first of what?

The Witness: Oh, the 1st of December.

Q. Now during the period of time that the vessel left Shanghai around the 1st of December, did you ever speak to the captain again? A. It wasn't Shanghai the 1st of December. We were in Tsingtao on the 1st of December.

Q. Let me withdraw that question and put it this way: After the vessel left Shanghai did you talk to the master
143 again about Mr. McAllister? A. Yes, I asked him what he intended to do about it.

Q. What did he say? A. Because he was beginning to worry about being shorthanded. He said, "Well, we got him to Tsingtao. I will put him ashore. Then see if we can get a doctor for him."

Q. You left Shanghai on the 23rd. Where were you on the 24th? A. At sea.

Q. Where were you on the 25th? A. That is the day we arrived at Tsingtao.

Q. Were there any hospital facilities at Tsingtao? A. Yes, there was a marine hospital on shore.

Q. Did you on that day speak to the master? A. Yes,
144 I did.

Q. What did he say to you and what did you say to him? A. I said, "Captain, are you going to make some arrangements for a doctor for McAllister?" He said "Yes."

Q. Did he? A. No.

Q. What about the next day? A. Well, the next day I don't recall whether I spoke to him about it again or not, but I do know I spoke to the other fellows on the ship about it.

Q. To whom did you speak? A. I spoke to—

Mr. Gray: That is objected to as immaterial.

The Court: Is there an objection?

Mr. Gray: Yes. It is objected to.

The Court: I didn't hear it.

Mr. Gray: I object to it as immaterial.

The Court: Did he what?

Mr. Gray: The question is "Did you speak to someone else besides the master?" and I object to it as immaterial.

The Court: Objection sustained.

146

Q. Was there any person aboard the vessel who had charge of medical supplies? A. Yes, the purser.

Q. Did you speak to the purser about McAllister? A. Yes, on several occasions.

Q. Is the purser here in court? A. Yes.

Q. What is the purser's name? A: Napier.

Q. What was it you said to him the first time you spoke to him about Mr. McAllister? A. Well, what did he think it was about.

Mr. Gray: That is objected to.

The Court: I will let the answer stand. A. (Continuing). I just spoke to him. I said, "What do you think is the matter?" He said, "I am no doctor; I don't know." I said, "Do you think the captain will make some arrangements to get a doctor?" He said, "I will see." So he probably spoke to the master.

147

Q. In any event, you spoke to the purser on several occasions about getting a doctor for McAllister? A. That is right.

Q. And in substance, he said he would talk to the master about it? A. That is right.

Q. About how many occasions would you say that was? A. Numerous.

Q. Approximately? A. Six or seven times at least.

Q. That would be on six or seven different days? A. Yes, sir.

Q. Now, how long were you at Tsingtao before Mr. McAllister was removed from the ship? A. We arrived on the 25th. He was taken off the 1st. That would be about six days.

Q. Was he in his bunk all that time? Yes, he was.

Q. Was he getting any medication during that time as far as you know? A. Not that I know of.

Q. Was any doctor called to see him? A. No.

Q. Was he getting any food? A. Whatever he wanted the boys would bring.

Q. As far as you saw, did he take any food? A. No, he never took anything from them.

Q. Did you ever see anybody give him anything A. No.

Q. Did you ever see the master go into his room to talk to him? A. Not as far as I know.

Q. You never saw the master go into his room to talk to him? A. No, I never did.

Q. On December 1st, tell us what arrangements were made to take Mr. McAllister ashore? A. There was a Marine Corps ambulance with two corps men come down and took him ashore to the hospital.

Q. And that is the last you saw of Mr. McAllister? A. That is the last I saw of Mr. McAllister.

The Court: Let's stop there. A quarter past two.

(Recess until 2:15 p.m.)

AFTERNOON SESSION.

(Conference at the bench.)

The Court: Where is our witness?

Mr. Rassner: Will the mate please take the stand?

GEORGE A. LINNARTZ, resumed the stand.

Mr. Gray: Have you finished with your direct? 152

Mr. Rassner: Yes.

Cross Examination by Mr. Gray:

Q. Mr. Linnartz, how long have you been going to sea? A. This is starting my fourteenth year.

Q. So you were going to sea all during the war? A. Yes, sir.

Q. Didn't you know that all vessels operated under the United States flag during the wartime, were War Shipping Administration vessels?

153

Mr. Rassner: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. You stated on your direct, as I recollect it, that you were not notified that you were being employed by the United States on this vessel? A. I was hired and employed by Cosmopolitan Shipping Company.

Q. You didn't know you were being employed by the United States? A. No.

Q. Do you wear glasses? A. No.

Q. You can read English? A. Yes.

Q. I show you the shipping articles of Edward B. Haines for this voyage which has been produced by the Shipping Commissioner, and ask you if this is your signature on the second page at the top of the column? A. Yes, that is mine.

Q. And what is that printed directly over your name? A. "You are being employed by the United States."

Mr. Gray: I offer this in evidence, and may I substitute a photostatic copy.

The Court: No objection. Those were the
155 articles for this particular voyage?

Mr. Gray: Yes, sir. I ask that the photostat be marked in evidence.

Mr. Rassner: May I see it?

Mr. Gray: Right here (handing).

(Marked Defendant's Exhibit A.)

Q. Now, how do you fix the date of the time when first you saw or you thought that Mr. McAllister did not look well? A. It was two or three days before we left Shanghai. I said around the 21st.

Q. And you say at that time he told you he had a stiff neck? A. At that time he complained of being ill.

156 Q. No, no. Did he tell you then that he had a stiff neck? A. Yes, he did.

Q. And did he tell you he was partially paralyzed? A. No, not then.

Q. When? A. The next day. He was sick in bed that day.

Q. What was that? A. That would be the day we sailed, the 22nd.

Q. The 22nd? A. The day we left the dock, yes.

Mr. Gray: I should like the jury to look at these articles. The witness has testified this is his signature at the top of the first line.

Mr. Rassner: I object to Mr. Gray making any statement at all.

The Court: No, it is in evidence.

Q. Who was the officer on board the Edward B. Haines to whom reports of illness are normally made? A. To the purser.

Q. The purser was also a pharmacist's mate, was he not? A. Yes.

Q. And his name is Napier? A. Napier, yes.

Q. Do you recognize Mr. McAllister's signature when you see it? A. I don't know whether I would or not. I haven't see it in such a long time. 158

Q. I show you a paper and ask you if you recognize that as Mr. McAllister's signature?

Mr. Rassner: I will concede it. Let's not waste any time.

Mr. Gray: It is conceded that this is Mr. McAllister's signature?

Mr. Rassner: That is right.

Q. You are sure, are you not, that this alleged illness of which you claim to have knowledge, occurred before the vessel left Shanghai for Tsingtao? A. Yes, because he was sick the day— 159

Q. The answer is yes? A. Yes.

Q. During the night of the 24th to the 25th the vessel was at sea, was she not? A. That is right.

Q. And she was also at sea from the night of the 23rd to the 24th? A. That is right.

Q. I call your attention—

Mr. Gray: First I ask that this—

Mr. Rassner: Accident report.

Mr. Gray: —accident report be marked for identification together with the sheet annexed to it.

160

Mr. Rassner: May I see the sheet?

(Mr. Gray hands to Mr. Rassner.)

Mr. Rassner: I object to the second sheet. I have no objection to the first sheet going in evidence.

Mr. Gray: I ask to have the first sheet marked for identification.

Mr. Rassner: I offer the first sheet in evidence.

Mr. Gray: I object to parts of it. I agree that part of it may go in evidence but there are statements in there which I claim are not binding upon the defendant.

161

Mr. Rassner: I offer the whole thing in evidence.

The Court: What is the date of it?

Mr. Gray: November 24th.

The Court: I don't know where the date is on it. (Mr. Gray indicates.)

The Court: That is date when he states the illness was contracted. I am trying to find out when this report was made, if there is anything to show.

Mr. Rassner: Yes, it is down at the bottom. December 28, 1945—date sent—

Mr. Gray: There is no date on it. This is after it was received in New York.

162

Mr. Rassner: No, not after it was received; when it was sent. It says "Date sent." I offer it in evidence. Either it goes in or it stays out, that is all.

Mr. Gray: Where is the "date sent"?

Mr. Rassner: D-a-t-e—

Mr. Gray: This is the date it was sent to the Marine Index Bureau at 62 John Street.

Mr. Rassner: That is right. I offer it in evidence so that the jury may see it.

The Court: I will sustain both objections. Mark it for identification now. I have no doubt that it will go in at the same time.

(Marked Defendant's Exhibit B for Identification.)

Q. If I state to you on this report of illness signed by Mr. McAllister that he states the date of illness contracted was November 24th, 1945, would that cause you to change your testimony?

Mr. Rassner: I object to the form and substance.

The Court: I will let him answer it.

A. No, it wouldn't.

Q. Do you know anything about the symptoms of poliomyelitis? A. I am not a doctor.

164

Q. Are you able to state under oath that any of the persons about whom you have spoken on your direct testimony had poliomyelitis?

Mr. Rassner: I object to that.

The Court: I will let him testify if he can.

A. I can't diagnose the case, no.

Q. You are not prepared to say that any of those persons had poliomyelitis, are you?

The Court: Are you talking about the 150?

Mr. Gray: 150 plus 125.

165

Q. Any of them? A. No, I couldn't say.

The Court: 125 plus 125, wasn't it? 250 all told?

The Witness: Yes.

Q. Do you know to whom your cargo was consigned at Shanghai?

Mr. Rassner: Objected to as irrelevant, immaterial and incompetent.

The Court: Overruled. What was the cargo? What did it consist of?

The Witness: The cargo was trucks and flour, gasoline, some clothing.

Q. To whom was it consigned? A. It all was for these Chinese soldiers aboard.

Q. I asked you to whom it was consigned? A. I don't know who it was consigned to. I know it was for the Chinese soldiers, Chinese Army, probably.

Q. You mean the Chinese soldiers took it off the ship? A. Yes.

Q. And they were the truck drivers? A. Yes.

Q. Who unloaded the flour? A. The flour was unloaded by Chinese coolies.

Q. And how large were these bags? It was in bags? A. Yes, very small bags. I would say there was 50 pounds.

Q. Fifty pounds to a bag? What were they made of? A. Just white cloth bag.

Q. And they were discharged by coolies? A. Yes.

Q. You never used the members of your crew to discharge cargo, did you? A. Yes, we did.

Q. When? A. It was in one port that we did use our crew to discharge cargo.

Q. On that voyage? A. Yes.

Q. Where else did you discharge cargo on that voyage? A. We discharged cargo in Tsingtao and Tientsin.

Q. That was after Mr. McAllister had left the ship? A. Yes.

Q. Under what circumstances did you use the crew? A. Running winches.

Q. That wasn't handling the bags? A. No.

Q. Isn't it customary for the deck engineers to supply the winches? A. No, it is not customary. In fact, it is very rare.

Q. Did you ever have any of your crew handle that cargo, handle the steam winches? A. No.

Q. It isn't customary, is it? A. No.

Q. And it is customary—

Mr. Rassner: I object to counsel cutting the witness off in the middle of his answers.

The Court: If he is, that is a proper objection.

Mr. Gray: There was no cutting there.

Mr. Rassner: I object to Mr. Gray's side remarks. May we have this free of criticism? I appeal to the Court.

The Court: You can't prove it by me. Strike it all out.

Q. And it is customary, is it not, to hire shore leave for discharging cargo, is it? A. That is right. 179

The Court: That is the invariable practice here in America as well as abroad?

The Witness: Abroad, yes.

Q. So there was nothing unusual about hiring Chinese coolies to discharge the cargo? A. (No answer.)

The Court: Was there anything peculiar about these Chinese coolies?

The Witness: They were very sickly looking, undernourished. 171

The Court: Did you go on shore much during that trip?

The Witness: (No answer.)

The Court: I guess they were all pretty much emaciated?

The Witness: Yes.

The Court: It was a pretty tough time.

Q. Did you go ashore at Shanghai? A. Yes, I did.

Q. Did you see Mr. McAllister ashore at Shanghai? A. I can't say that I did because I never was very chummy with him.

Q. Well, the vessel arrived in Shanghai on September 26, 1945, did it not? A. That is right.

Q. Look at your log.

The Court: Arrived there?

Mr. Gray: Arrived. Arrived on September 26, 1945.

The Witness: That was the first voyage.

Q. And she stayed there until November 1st, 1945? A. Around that date.

173 Q. Look at the log. Let's get it accurately.

Mr. Rassner: There is no question about it.

Mr. Gray: I would like to try my case if it is all right with you.

Mr. Rassner: Yes, it is all right with me.

A. She arrived there at September 26th.

Q. And she left there when? A. November 1st.

Q. And where did she go from Shanghai on November 1st? A. To Hong Kong.

Q. When did she arrive at Hong Kong? A. On November 5th.

174 Q. That is 1945? A. That is correct.

Q. When did she leave Hong Kong? A. On November 7th.

Q. And where did she go from Hong Kong? A. Back to Shanghai.

Q. When did she arrive in Shanghai? A. November 11th.

Q. When did she leave Shanghai again? A. We took departure on the 23rd. We left the dock on the 22nd.

Q. What time of day did you take departure on the 23rd? A. 10:40.

Q. Well, is that morning or evening? A. Evening—I mean morning. 10:40 a. m.

Q. Where was she bound? A. For Tsingtao.

Q. And when did she arrive there? A. On the 25th.

Q. What time of day? A. 5:30 p. m.

Q. On November 25, 1945? A. Right. That is when we anchored and finished with the engines.

Q. Did she go alongside of a wharf at Tsingtao? A. Yes.

Q. When? A. On the 28th.

Q. How far was she from the wharf when she first anchored? A. I would s[illegible] if I can recollect right about four or five miles.

Q. Were there any means of communication between the ship and the raft on that anchorage? 176 A. Yes, Army motor launches.

Q. Was not the vessel under the direction of the United States Army in Shanghai? A. On the first voyage, yes, because we had American cargo, but after that I couldn't tell you under whose supervision.

Q. Didn't the captain tell you under whose direction she was? A. No. We were hearing from our agents in different ports.

Q. Who was the agent at Tsingtao? A. War Shipping Administration.

Q. Who was the agent at Shanghai? A. I really don't know. 177

Q. You were the chief officer of the ship? A. That is right.

Q. You don't know or don't recollect? A. I had no contact at Shanghai and at Tsingtao I did.

Q. And these 125 passengers were picked up at Shanghai to go to Tsingtao? A. Correct.

Q. And at Tsingtao the agent was U. S. War Shipping Administration? A. That is right.

Q. And that is a United States agency? A. I really don't know. War Shipping Administration.

Q. While the vessel was at Shanghai, how many people were on board at one time—the greatest number of people as you recollect it? A. Well, there would be five gangs of

stevedores. The thirty men that we had working on deck, that would be I would say around 180 men there, and quite a few peddlers would be aboard ship.

Q. Two hundred people? A. Yes.

Q. They had to have some toilet facilities didn't they? A. Yes.

Q. Do you know of any better toilet facilities than those that were provided? A. No, considering that was not a passenger ship.

Q. You did the best you could with what you had to work with? A. Yes, we had to.

179 Q. And this sewage flowed off into the river, did it not? A. Yes, over the side.

Q. You didn't see any of the men swimming in the water did you? A. No.

Q. You say Mr. McAllister was taken ashore by an ambulance from the Marine Corps Hospital at Tsingtao? A. Yes, Marine Corps Hospital.

Q. That was the 1st of December 1945? A. Yes, as near as I could remember.

Q. Did you have anything to do with it? A. No, except to see that he had help for the two corpsmen, to see that they could manage all right.

180 Q. They carried him down, he didn't walk? A. That is right.

Q. Did he tell them how he felt? A. Yes.

Q. What did he say? A. He said he felt terrible.

Q. He said he felt weak, too? A. That is right.

Q. That is why they carried him? A. That is right.

Mr. Gray: That is all.

Redirect Examination by Mr. Rassner:

Q. One other question. I notice that there is a stamp on Defendant's Exhibit A, and ask you if you recall seeing that stamp in the upper lefthand corner at the time you signed it? A. I don't recall seeing it, no.

181

Mr. Rassner: That is all. No further questions.

Mr. Gray: That is all.

Mr. Rassner: Excuse me. (To witness:) I refer to the stamp, your being employed by the United States. Is that what you had reference to?

The Witness: Yes.

Mr. Rassner: That is all of this witness. Will the purser take the stand.

The Court: Who were these passengers that you speak of? Were they part of the Chinese Army?

The Witness: No, they were civilians.

182

The Court: Were they engaged in war work and traveling gratis?

The Witness: They were Chinese Nationalists and they were engineers and they were being sent from Shanghai to Tsingtao to open a power plant, and it seems it was impossible to travel by rail; they had to be transported by ship because the Communists were in between.

Mr. Rassner: They were ordinary civilian passengers?

The Witness: That is right.

The Court: But they were not traveling as civilian passengers. It was a time of war and China 183 was at war with the—

Mr. Rassner: No, this was after the war.

The Court: When you talk about after the war that is something else.

Mr. Rassner: We are talking about after the war.

The Court: We don't know in this country whether it is after the war or not. They certainly don't know in China.

Mr. Rassner: That is right. But here were passengers, no more, no less, put in there by the defendant, and that is all.

The Court: You don't know how they got there,

who put them there or what they were doing except they were going from one port to another?

The Witness: That is right.

The Court: Insofar as these truck drivers are concerned, they were put there in some way by the Chinese Nationalist Government for the purpose of taking over or guarding the trucks on their way to Tsingtao, is that correct?

The Witness: That is right.

Mr. Rassner: Do you know how much money the defendant got for transporting these people?

The Witness: No, I do not.

Mr. Gray: You don't know that the defendant got a cent out of it.

The Witness: Yes.

Mr. Gray: And at that time was not China in a state of war between the Chinese Communists and the Nationalist Government?

The Witness: Yes. It still is.

Mr. Gray: That is all.

Mr. Rassner: That is all.

PATRICK EDWARD NAPIER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Rassner:

Q. Mr. Napier, what are you doing now, that is, at the present time? A. At the present time?

Q. Yes. A. I am going to college in Berea, Kentucky, studying argiculture.

Q. And back in the latter part of 1945 what was your job? A. I was junior assistant purser, Hospital Corps pharmacist's mate aboard the S. S. Edward B. Haines.

Q. What were your duties? A. My duties as purser was to keep the record of the ship in regard to payroll and to keep the medical records which came up under my duty as pharmacist's mate.

Q. And was it part of your duties to render such first aid or medical treatment as was required aboard the vessel? A. Yes, sir.

Q. Did you have a physician aboard ship? A. No, sir.

Q. Did that duty include taking care of such passengers or other personnel that might have been aboard the vessel that needed treatment? A. Well, technically, no. 188

Q. But actually? A. But actually if a person is sick I am supposed to do what I can for him, being a pharmasist's mate.

Q. They had no other medical facilities? A. That is right.

Q. You had charge of the medical facilities? A. That is right.

Q. Did you make a written entry regarding McAllister? A. I made a written entry in the official logbook on December 1st, 1945, to the effect that Mr. McAllister was taken ashore.

Q. For what purpose? A. For diagnosis.

Q. And was it for hospitalization as well? A. Well, 189 the medical report I believe reads for diagnosis and then at a later date, after I received the report from the hospital, he was kept in the hospital but no entry was made to state that he was left ashore other than—wait a minute until I get myself straightened. For diagnosis he was sent ashore.

Q. Who made the entry concerning Mr. McAllister on the 24th of November, 1945?

Mr. Gray: In where?

A. In where? Yes.

Q. Any place at all that you knew of. A. Any place at all?

190 *Patrick Edward Napier—Direct.*

Q. Yes. A. I don't remember the exact date that I wrote the illness report.

Q. I show you this illness report and ask you if this is the report you have reference to (handing)? A. Yes, sir.

Q. Is that a report that was made in the regular course of business of the ship? A. That is right, sir.

Q. And was it made by you? A. Yes, sir.

Mr. Rassner: I offer it in evidence. That is
191 the same report that was marked Defendant's Exhibit B for identification.

Mr. Gray: I should like to interrogate the witness on this before I agree to it.

The Court: All right.

Mr. Rassner: All right.

By Mr. Gray:

Q. I notice on this Exhibit B for identification on the line marked 2A—"In whose employment when taken ill?" and typed in is "Cosmopolitan Shipping Company, Inc." Did you type that in? A. Yes, sir.

192 Q. Did you have any information upon which you typed that? A. On the basis of four previous voyages and nothing had been said to me previous to that and I worked for Cosmopolitan since I was going to sea and that was the customary thing to put on that line.

Q. Whenever you went to sea you went to sea with a vessel allocated to the Cosmopolitan—

Mr. Rassner: I—

Mr. Gray: Wait a minute.

Q. —you went to sea on a vessel allocated to Cosmopolitan by the War Shipping Administration?

Mr. Rassner: I object to that as to form.

The Court: I don't think it has been finished yet.

Q. (Question read.)

Q. (Continuing.) And you had no other information of the relationship between War Shipping Administration and the Cosmopolitan Shipping Company, Inc., other than your guess, did you?

Mr. Rassner: Now I object to that as improper in form. I object to the form of the question. 194

The Court: There can't be any mystery about it. I stated it myself when the jury was examined. This was a vessel owned by the United States. Now it develops that it was a Liberty ship, which is not a passenger ship but a cargo ship used during the war, and that that vessel, namely this Haines ship, was operated by this defendant, the Cosmopolitan Steamship Company, Inc., under a regular agency agreement which in substance provided that the entire expense of operating the ship was to be paid by the Government and that the Cosmopolitan Shipping Company was to receive an overriding commission, as I understand it. 195

Mr. Rassner: That is clear.

The Court: I think that in substance is true.

Mr. Gray: Yes, that is true.

Mr. Rassner: No question about it.

The Court: Now this question whether this man was an employee of the Government or whether he was an employee of somebody else is a question I suppose that must be determined as a question of law. I don't think it will arise in this case in that form. However that may be, I don't think there is any use sparring around about it at this time.

196 Mr. Gray: No, sir. All I wish to make clear is that when someone writes down that Mr. McAllister was in the employment of Cosmopolitan Shipping Company that is a matter of law to be determined from the wording of the agency agreement.

The Court: And also what the Supreme Court has stated. You know what I mean.

Mr. Gray: Yes, in the Hust case. That I think only applied to the period—

197 The Court: I don't think the jury would be interested in that rather technical argument. I am not very much either.

Mr. Gray: As long as it is clear. With that condition I agree to the offer of the report.

The Clerk: This is your exhibit, Mr. Rassner?

Mr. Rassner: Yes, it is my exhibit.

The Court: This is what? An illness report?

Mr. Rassner: Yes, your Honor.

The Court: Made out by this witness Napier?

Mr. Rassner: That is right.

The Court: And is that dated or not?

(Plaintiff's Exhibit 4 received in evidence.)

198 Mr. Rassner: The answer to your question is no.

The Court: Seems to have a system of not dating.

Mr. Rassner: However, we will fix the date perhaps with the next question.

The Court: This is the same one that you were talking about before?

Mr. Rassner: That is correct, your Honor.

The Court: All right.

By Mr. Rassner:

Q. Now, would you be good enough—

Mr. Rassner: After your Honor is through with that, of course.

The Court: All right.

Q. Would you be good enough to look at Plaintiff's Exhibit 4.

The Court: That is exactly the same document which was Defendant's Exhibit B for Identification?

Mr. Rassner: Exactly the same.

The Court: And it has become B now?

Mr. Rassner: No, Plaintiff's Exhibit 4. 200

Q. Will you be good enough, Mr. Napier, to look at Plaintiff's Exhibit 4. Will you tell us the exact date upon which that report was made out by you? A. No, sir.

Q. Now, I call your attention to item 6 on the first page, and there is a date there, November 24, 1945, as the date illness contracted. Will you tell us about that and what does that mean? A. Well, generally, in a case of this type, when you put down the date of illness contracted, you ask the person for whom you are filling out this report. I asked Mr. McAllister what date he contracted the illness as far as he could ascertain. Well, this is the date that I 201 have written down—November 24, 1945.

The Court: That is in your handwriting, is it?

The Witness: Yes, sir.

Q. Now, is that the first time that you knew that Mr. McAllister was ill or had it been called to your attention on a previous occasion? A. I remember talking to Mr. Linnartz about this case and I went to see Mr. McAllister and Mr. McAllister said he was feeling all right.

Q. How many days before this 24th? A. I don't remember.

202 Q. Well, approximately. Just your best recollection? A. About two days.

Q. And your best recollection is that about two days before the 24th you spoke to Mr. McAllister. Can you tell us what the conversation was? A. As near as I can remember I stopped by his room and asked him how he was feeling. He said he was feeling all right, so I let it go at that.

Q. What were the circumstances which caused you to go to his room and inquire about his condition? A. I knew that he had not been feeling too well.

203 Q. How did you learn that? A. From conversation aboard ship that had never been reported to me.

Q. The date it was officially reported to you was the 24th? A. That is right.

Q. What, if anything, did you do about it then? A. There wasn't very much I could do about it because we were at sea and he was already in bed on the 24th, so I couldn't give him any treatment because I didn't know what was wrong with him. I cannot diagnose the case.

Q. Do you know what illnesses were prevalent at Shanghai about the 20th, the 21st, do you?

204 Mr. Gray: I object to that. The witness hasn't been qualified.

The Court: What is the question?

Q. (Question read.)

The Court: I will let him answer it there were any.

Mr. Rassner: If there were any.

A. I cannot state specific illnesses which may have been prevalent in the port of Shanghai at that time. However, I do remember typing out a paper which was given to me by the skipper or the captain, and I typed out several of

those and posted them all over the ship. I don't remember what illnesses.

Q. Can you tell us to the best of your recollection? A. I can't state specifically what was on that list.

Q. Does any come to your mind included on that list? A. That would be hard. I don't remember the specific illnesses. I do recall the report saying be careful what we were eating and be careful of the places we went to, and specifically not to eat ice cream ashore.

The Court: That would be a notice, I suppose, that would be posted in any port you went into, including New York or Boston. It would be a general notice that would be applicable almost any place that the ship touched where the sailors went ashore. I don't know that; I am just wondering if there isn't always some precaution taken by the ship when a ship lands in an alien country. 206

Mr. Rassner: At least there should be.

Q. In any event, were there specific diseases listed in that notice? A. As near as I remember.

Q. In other words, specific diseases were mentioned but you don't know exactly what they were? A. That is right. 207

Q. But you don't remember what they were? A. I can't remember.

Q. When you learned that Mr. McAllister was confined to his bed, did you go to see him? A. Yes, sir.

Q. And that would be about the 24th that he was confined to his bed? A. Yes.

Q. Now, tell us what you observed as near as you can recall? A. As near as I can recall he was lying in his bunk and said that he felt very bad.

Q. Were you able to observe how he moved about? Do you remember that? A. I don't remember.

Q. Did you have a lot of illnesses to take care of at that time? Were you quite busy at that time? A. I was quite busy at that time.

208 *Patrick Edward Napier—Direct.*

Q. Taking care of what? A. Taking care of about eleven venereal cases and just before we entered Tsingtao I had another case come up which required almost all of my time.

Q. What was the nature of that? Was that diagnosed? A. That was diagnosed enough so that I could isolate the patient.

Q. In other words, it was some contagious disease? A. Yes.

Q. You don't recall what that was? A. I do recall.

Q. What was that? A. Syphilis.

209

The Court: What?

The Witness: Syphilis.

Q. Do you recall any of the symptoms that Mr. McAllister had when you saw him on the 24th? A. I just remember he was weak, he was lying on his bed.

Q. Did you speak to anybody about Mr. McAllister's illness? A. I reported it to the captain.

Q. When? A. I don't remember the exact day. It should have been the same day. I believe it was.

Q. That is your best recollection? You reported it the same day? A. Yes, sir.

210

The Court: That is on the 24th?

The Witness: That is, or about the 24th. I don't remember the exact date.

Q. The 24th is your best recollection? A. That is right.

Q. Do you remember where the master was at the time when you reported to him? A. No, sir, I don't.

Q. Do you remember about what time it was? What time of the day? A. I can't remember.

Q. Do you remember the conversation you had with the master, the substance of it? What he said to you and what you said to him? A. I told him Mr. McAllister

211

wasn't feeling good and that when we got to port we should try to get him to the hospital and get a checkup.

Q. What did the master say? A. He said we will see later.

Q. And did you consider the symptoms? A. At that time I could not state any specific symptoms, as to any specific disease. I did tell him Mr. McAllister was in a weakened condition. He could be very sick. I didn't know.

Q. Did you say anything about Mr. McAllister being confined to bed? A. Not that I recall.

Q. Whatever symptoms you then observed, did you advise the master of it? A. As near as I remember I did tell the captain that Mr. McAllister was sick and stated that he was in bed. I didn't say how long he would have to be there or anything at all like that that I can recall.

212

Q. You said he should be seen by a doctor? A. Yes.

Q. There is no doubt about that in your mind? A. No, sir.

Q. How many times after that did you talk to the master about Mr. McAllister's illness? A. I don't know.

Q. Did you mention it to him daily until Mr. McAllister was removed from the vessel? A. I was making practically daily trips to the hospital in Tsingtao and I spoke to the skipper a couple of times about it that I can remember, about Mr. McAllister.

213

Q. What was the substance of the conversation the other times after the 24th?

The Court: That would be after the 24th and before the 1st of December.

Q. After the 24th of November? A. After the 24th of November?

Q. Yes. A. I cannot remember the conversation.

Q. Was it substantially the same? A. Yes.

Q. And was the master's response substantially the same? A. Well, he said, "We'll see about it."

Q. That is the best you had from the master? A. That is right.

Q. Did you get any specific orders as to what to do with Mr. McAllister? A. No, sir.

Q. Was it up to you to have Mr. McAllister removed to the hospital? A. It is up to me to report any case of illness to the master.

Q. Together with the nature of the illness, or whatever you observed about the symptoms, is that right? A. Yes.

215 Q. And did you do it? A. I did.

Q. Although you don't remember exactly what the symptoms were, you knew whatever they were you reported about them to the master? A. That is right.

Q. And that was done on several occasions between the 24th of November and the 1st of December 1945? A. Yes, sir.

Q. Getting back to Shanghai, did you hear the mate testify to the medical facilities available? A. I did.

Mr. Rassner: Now in order to save time, I would like a stipulation that if this witness were
216 asked questions about the medical facilities, his testimony would be substantially that of the previous witness.

Mr. Gray: His testimony was so confused. This man knows. You had better do it.

Mr. Rassner: All right.

Q. Will you tell us what medical facilities were available at the port of Shanghai before you left there? That would be about the 22nd or 23rd of November. A. Well, as near as I remember, the St. Olaf was there. That is a hospital ship. And the Repose.

Q. Is that also a hospital ship? A. Yes.

Q. Now, was there an Army Base across the river? A. That is right.

Q. Did they have a hospital and medical facilities? A. They had a first aid station.

Q. Did they have doctors there? A. Yes, sir.

Mr. Rassner: Your witness.

Cross Examination by Mr. Gray:

Q. Now on the 24th of November, 1945, the Haines was at sea, wasn't she? A. That is right, sir. 218

Q. And that was the time when Mr. McAllister first reported to you that he was sick, wasn't it? A. That is right, sir.

Q. You couldn't use any facilities at Shanghai at that time, could you? A. No, sir.

Q. You couldn't use any facilities until you got to Tsingtao, could you? A. Not until we arrived in Tsingtao.

Q. Now I notice on this Exhibit 4, there is a rubber stamp reading "Reported to Marine Index Bureau, 62 John Street, New York; date sent, 12/28/45." Was that on here when you made out this report? A. No, sir.

Q. I also refer to this illness report, Plaintiff's Ex- 219
hibit 4, and ask you if that wasn't signed before Mr. McAllister left the ship? A. This?

Q. Yes. A. No, sir, this was not signed before he left the ship.

Q. When did he sign it? A. As near as I can remember on about the day the ship left the port or the day before.

Q. The day before the ship left the port at Tsingtao? A. At Tsingtao.

Q. What date was that that he was taken ashore? A. I don't recall the date that he left.

220 *Patrick Edward Napier—Cross.*

Q. I show you the logs. Look in there and tell us when you left Tsingtao? A. "Departure, 10.50." That must be 10.50 a. m. That is December 3rd, 1945.

The Court: December 3rd?
Mr. Gray: December 3rd.
The Witness: That is right.

Q. Then what is your recollection as to the date upon which Mr. McAllister signed this Exhibit 4? A. Either December 1st or 2nd.

221 Q. December 1st was the day he was taken ashore? A. That is right.

Q. Did you go ashore with him? A. No, sir.

Q. Did you see him ashore that day? A. I don't know whether it was that day or the next day, sir.

Q. And did he give you all the information which you have written here in longhand? A. No, sir. This was my own observation. All the information above my signature was given by him and below that was my own observation.

Mr. Rassner: I did not hear.

222 The Witness: All the information above the signature on the front side of the page was given to me before by Mr. McAllister or from the records aboard ship. Below his signature or in back of the page are my own information or observations which I secured from the hospital at Tsingtao.

Q. Now I see on the back of this page under the item No. 10, "Condition of patient on discharge from vessel," and then in handwriting, "No appetite, dizziness, unable to hold food on stomach—weak." Where did you get that information? A. From observation.

Q. Observation of Mr. McAllister? A. That is a condition before he left the vessel. I wasn't aboard ship

when he left the ship but I was there that morning. At that time I had gone to the hospital myself.

Q. But you saw Mr. McAllister on the morning he left the ship? A. As near as I recollect, yes.

Q. And did you get any of this information from him? A. Not on the back. I got it from him earlier.

Q. From where? A. Earlier.

Q. You got it from him earlier? A. Yes, that is, after the 24th—after we got in port.

Q. In other words, these are all the symptoms that he told you he had? A. Well, all that I can recollect.

224

Q. That was all you could recollect on the 2nd of December, 1945, wasn't it? A. So far as I can remember now.

Q. Now, did a Lieutenant DiGeorgio come aboard ship in order to get McAllister? A. I wasn't aboard, sir, when the doctor came from the hospital.

Q. I show you a piece of paper and ask you if you recognize that? A. Yes, sir.

Q. Will you please describe what it is? A. Well, after I took Mr. McAllister to the hospital, or rather after he was up there and I visited him at the hospital, I had to have some statement as to whether or not he was going to be able to make the trip away from the port. I needed

225

that for payroll purposes and for the medical report; and this is the statement which was given to me by this Lieutenant-Commander.

Q. This Lieutenant-Commander was stationed where? A. At Tsingtao, China.

Q. At what hospital? A. It is on the back of that.

Q. (Handing paper.) A. Division Field Hospital No. 16 Marine Division, Tsingtao, China. It states here that he was admitted at 11/30/45.

Q. And this paper which I showed you is the paper signed by Lieutenant-Commander DiGeorgio? A. That is right.

Q. Was he a medical officer? A. He signed, "Lieutenant-Commander, Medical Corps, U. S. Navy."

226 *Patrick Edward Napier—Cross.*

Mr. Gray I offer it.

Mr. Rassner: I would like to ask the witness a question before I comment on it.

By Mr. Rassner:

Q. Was this paper signed by Lieut. Commander Di-Georgio before he made an examination of Mr. McAllister? A. I can't remember, sir, because the date is obscure on that paper.

227 Mr. Rassner: Is that your best recollection? I call your attention to the date on top? Does that look like it was of December 1st?

The Witness: December, yes, sir, it does.

By Mr. Gray:

Q. Was that paper given to you before Mr. McAllister was examined by the hospital authorities? A. I don't remember that.

Q. Is that your best recollection? A. Yes.

228 The Court: Well, there was something you said about 9.30—or 11.30—that would be the 30th day of November—in one of your previous answers. I don't know what that meant.

The Witness: I believe that is on the back of the report—"Admitted 11/30/45 in the hospital."

(Mr. Gray hands witness paper. Witness hands same to the Court.)

The Court: You wrote that there, did you?

The Witness: Yes, sir.

The Court: Was that the date he went to the hospital? I thought you said it was December 1st.

The Witness: Well, December 1st is the entry I had in the official logbook. That is when his pay-

roll ended on the vessel. Now from there it is my own handwriting. It is 11/30/45, so that must have been the date.

Q. So he went into the hospital on the 30th of November?

Mr. Rassner: I thought I was examining the witness, Mr. Gray.

Mr. Gray: I thought you had finished.

Mr. Rassner: No, I hadn't.

The Court: Well, I asked him some questions 230
but I had no idea I was examining him.

By Mr. Rassner:

Q. That is what I want to get straightened. There is a statement by Lieutenant DiGeorgio which says that he was admitted for diagnosis and treatment. Doesn't that indicate to you that that statement was made before an examination was made?

Mr. Gray: That is objected to as argumentative.

Mr. Rassner: You brought this out. This is in the nature of cross examination. I submit I have some— 231

Mr. Gray: He is your witness.

The Court: Read the question.

Q. (Question read.) A. Not necessarily.

Q. In other words, you can't recall at the present time? A. I was at the hospital when one of the preliminary examinations was being given. That is when he had this spinal tap and I can't remember whether I received this piece of paper before or after that preliminary examination.

Q. Well, is it your best recollection that that paper was received by you on December 1st? A. Well, it is dated December 1st.

232 *Patrick Edward Napier—Cross.*

Q. Does that refresh your recollection? A. Yes, I would say so.

Q. That is your best recollection? A. I can't remember the exact dates.

Q. That is why I put my question as to your best recollection, and your answer is yes? A. That is right.

Q. And is it your best recollection that that particular paper was made before the examination of Mr. McAllister was concluded? A. Before the final examination, yes, because we had left the port.

233 Q. That is what I would like to know. Would you mind elucidating on that a bit so we get it clear; there won't be any doubt about it. A. As near as I can recall—

The Court: Let's see the paper.

(Witness hands paper to the Court.)

How much longer are you going to be?

Mr. Rassner: I am through.

A. As near as I can recall when I went to the hospital to visit Mr. McAllister, I was there just in time to see one of the preliminary examinations. At this time he received a spinal tap. That is taking fluid from the spinal cord. And
234 that is as much of the examination as I saw. And as near as I can recall, it was after this that I got this paper here. I can't recall exactly whether it was before or after, but it was, I believe after. It was after the examination that I saw.

Q. In other words, it was after the spinal tap? A. Yes, it was after the spinal tap.

Q. But before the examination was concluded?

The Court: Well, that is perfectly apparent from the paper. I don't know whether the jury has seen it.

Mr. Rassner: I would like to offer it.

Mr. Gray: I have offered it already.

Mr. Rassner: That is all of this witness.

The Court: We will take a recess.

(Defendant's Exhibit C received in evidence.)

(Recess.)

Mr. Gray: With the Court's permission I will read this exhibit, Defendant's Exhibit C, which has just been introduced, to the jury.

The Court: Is that Defendant's Exhibit C?

Mr. Gray: Yes, sir.

(Mr. Gray reads Defendant's Exhibit C to the jury.)

By Mr. Gray:

Q. Mr. Napier, what had been your medical experience prior to your signing on the Haines? A. I received three months' training at the U. S. Maritime Service training station, Sheepshead Bay, Brooklyn, New York.

Q. And what was the type of that instruction you received? A. Well, I took six courses in anatomy and physiology, emergency treatment, minor surgery, nursing and pharmacy, clinical laboratory and something else—I don't remember exactly now.

Q. Well, it was a medical subject? A. Yes, sir, oh, yes.

Q. And after you had had that three months' training at that medical establishment then where did you go, if anywhere? A. I stayed at Sheepshead Bay for six weeks, taking my purser's training. Then I went to Baltimore Marine Hospital for one month.

Q. And you worked in Baltimore Marine Hospital during that entire period, during that one month? A. Yes.

Q. Did you have any handbook with you on board the Haines which set forth the various symptoms for various diseases? A. I had a small book called "United States Public Health Service, The Ship's Medicine Chest, and

First Aid at Sea.'" Something like that. I don't remember the exact title of the book. That is standard equipment for all merchant vessels.

Q. And did that include any list of symptoms? A. Yes, sir.

Q. And did you examine this book of symptoms when Mr. Napier told you on the 24th of November that he felt sick?

Mr. Rassner: Mr. McAllister.

239 Q. Mr. McAllister, to see if you could diagnose his ailment? A. No, not that I recall, no, sir.

Q. Then is it correct to say that these symptoms which you have written in your handwriting on the back of Plaintiff's Exhibit 4, were all of the symptoms that he told you he had up to the time he left the ship?

Mr. Rassner: I object to that. Mr. Gray's memory seems to be faulty. He told him no, those are his own observations.

The Court: He can answer.

Mr. Gray: Will you please repeat the question?

240 Q. (Question read.) A. Well, as near as I can remember, yes.

Q. Do you remember whether you treated him for an upset stomach? A. I did ~~not~~, no, sir.

Q. Do you remember whether you gave him some bicarbonate of soda? A. I didn't give him any.

Q. At the time he had left the ship—up to the time he had left the ship while he was under your jurisdiction had you diagnosed his case as polio? A. No, sir. That is why I sent him ashore, to be diagnosed.

Q. To find out what was the matter with him? A. Certainly.

Q. And by the time he left the ship at Tsingtao had his malady been diagnosed at the Marine Hospital?

Mr. Rassner: That is objected to.

The Court: He has already testified to that.

Mr. Gray: My recollection is he hasn't testified directly to that particular point.

The Court: If you want to amplify it, you may. I thought on December 1st Exhibit 5 was given to him, and up to that time he thought there had been a spinal tap.

Mr. Gray: But as I recollect it, the spinal tap was given before he got this Exhibit C.

Q. When the ship left port at Tsingtao did you know 242
that Mr. McAllister had been diagnosed as a polio case? A. No, sir. The white piece of paper is the only statement I had or the only one I could procure. When I got that I left the hospital and as near as I can recall that is the last time I went back up there.

Q. As the medical officer on board this ship, did you have any notice that there was an epidemic of polio either on shore or at Hong Kong or Tsingtao? A. No direct notice that I can recall other than this paper which stated that there were some diseases in the port of Shanghai.

Q. Did you have any notice? Or don't you recall? A. I cannot recall the specific diseases, no, sir. 243

Q. You don't recall whether polio was included in it or not? A. Well, I can't recall the specific diseases.

Q. Did Mr. McAllister request you to send him ashore at or before a time when he was sent?

Mr. Rassner: That is objected to as entirely immaterial.

The Court: I will permit the question.

A. No, sir.

Mr. Gray: That is all.

244 *Patrick Edward Napier—Re-direct.*

Re-direct Examination by Mr. Rassner:

Q. Can you explain the apparent discrepancy between the date on the back of the illness report and the log entry of the illness report, showing November 30th and the log entry showing December 1st, and DiGeorgio's report showing December 1st?

Mr. Gray: There is no discrepancy. Mr. DiGeorgio's report does not say December 1st. That is the date of the DiGeorgio report. The witness has
245 already explained why the entry was made on the 1st of December.

Mr. Rassner: May I have the question answered?

The Court: Yes, you may answer it.

A. Well, I remember going to the hospital on the 30th and —the skipper, incidentally, was with me at that time—and one of the two of us asked for Mr. McAllister—I mean for a doctor to go down to look at him or to send transportation to the ship to bring him ashore. Now that was on the 30th because I had another person with me at that time who was being treated at the hospital.

246

The Bailiff: Your Honor, that lady has fainted again.

The Court: Get the nurse up.

I am wondering if we could recess until tomorrow. I think probably we should recess until tomorrow. It is getting a little bit late anyway. I will see you tomorrow and hope you will be better. Half past ten, room 905.

(Jury excused at this point.)

Mr. Rassner: May we see the Court a minute? (Conference at the bench.)

Mr. Rassner: May the record show in view of

the fact that jury lady No. 9, Florence G. Harman, is apparently not feeling well, or is indisposed, that in the event for any reason it should be found that she cannot sit throughout the entire case—

Mr. Gray: And is excused.

Mr. Rassner: And is excused for any reason, the case shall be determined before the remaining eleven jurors with the same force and effect—

Mr. Gray: Shall continue and be determined before the eleven remaining jurors.

Mr. Rassner: With the same force and effect as 248
if before the twelve.

(Adjourned until February 3, 1948, at 10:30 a.m.)

New York, February 3, 1948, 10:30 a. m.

TRIAL RESUMED.

Mr. Rassner: Will the purser please take the stand.

PATRICK EDWARD NAPIER, resumed. 249

Redirect Examination by Mr. Rassner (Continued):

Q. Mr. Napier, I believe that last night before we adjourned, I asked you to be good enough to explain the apparent inconsistency between the date on the back of the accident or illness report and the log entry—that is, the accident report showing November 30th and the log entry showing December 1st. Now in order to perhaps refresh your recollection, I would like to show you the master's report and the original shipping articles to which it is attached.

250 *Patrick Edward Napier—Re-direct.*

Mr. Gray: I object to showing this to the witness unless he needs something to refresh his recollection and then unless it appears that what the master wrote would refresh his recollection.

The Court: No, I will let him look at it and testify.

(Mr. Rassner hands paper to witness.)

Q. Can you explain it to us now? A. Well, I reported to the hospital on the 30th.

Q. That is, you reported? A. Yes, sir.

251 Q. Yes. A. I reported to the hospital on the 30th with another case and at that time—I believe it was myself—the master was with me, I believe on the same day—one of the two of us reported this illness aboard the ship and asked that Mr. McAllister be taken off the ship and brought to the hospital. Now that was on the 30th. That evidently is the reason for that "Admitted 11/30/45." He was admitted to the hospital but he wasn't brought there at that time.

Q. In other words, he was brought to the hospital at a later date? A. On the 1st.

252 Mr. Rassner: Now at this time, with the Court's permission, I would like to read from Defendant's Exhibit A (reads from Defendant's Exhibit A to the jury).

Q. Now at this time I would like you to tell us whether or not when you signed these articles this stamp appearing on Defendant's Exhibit A, was noticed by you? Did you ever notice that stamp before? A. Well, not at the time of the signing, but I knew it was there because I am the purser.

Q. All I asked you is, did you notice this particular stamp at the time you signed it? A. Not at the time I was signing, no, sir.

Q. That is all I asked.

253

Mr. Rassner: I ask that the balance be stricken out.

The Court: I will let it stand.

Q. You don't know how long after that was signed that that stamp was put on?

Mr. Gray: I object to that. That is an official document.

The Court: Sustained. He doesn't know anything about it.

254

Mr. Rassner: An official document can be altered, too. It could be changed.

Q. As far as you know, who was your employer? A. The United States. The War Shipping Administration. The Cosmopolitan Shipping Company was their general agents.

Q. When did you find that out? A. When I started going to sea.

Q. On the medical report, I call your attention to the fact that under paragraph 2, subdivision (a) "In whose employment when taken ill?"—referring to Plaintiff's Exhibit 4—"Cosmopolitan Shipping Company, Inc." Is that correct? A. That is right.

255

Q. And that is what you said at the time that you made out the report, is that correct? A. That is correct.

Mr. Gray: That is objected to as not binding on this defendant because this witness is not an officer of the company.

The Court: What is the question?

(Question read.)

The Court: Sustained. Said to whom?

Q. It was you who made the statement on the illness report that the plaintiff Robert McAllister was employed at the time taken ill by Cosmopolitan Shipping Company, Inc.?

Mr. Gray: That is objected to. This man is not competent to bind the defendant.

The Court: Did he make that statement on the report?

Mr. Rassner: Yes.

The Court: That is not his report.

Mr. Rassner: Yes, that is his report.

Mr. Gray: That is the Army Hospital report.

The Court: I think he asked that yesterday. I will let him explain in his own language what he meant by it.

Mr. Rassner: I withdraw the question.

Q. You remember my communicating with you—that is, through my office by phone and by wire, asking you to come here? A. That is right, sir.

Q. And then under date of January 28, 1948, you wrote a letter to the attorney of record, Mr. Dembo, and a copy to Mr. Gray, stating in substance that you couldn't come down here, is that correct? A. I have a copy of it in my folder.

Q: Is that the substance of it, that you couldn't come down here? A. I would have to read the letter before I tell you what I said.

Q. Oh, of course (handing). A. Around January 28th I said—

Q. No, no.

Mr. Gray: Let him answer the question you asked.

Mr. Rassner: That is not my question.

A. You mean I couldn't come to New York?

Q. That is right. A. I did tell you I was in school and the second semester had started and it would be very inconvenient for me to miss very much of my schooling.

Q. That is right. You did come down here and you visited Mr. Gray's office, is that correct? A. That is right.

Q. And arrangements for that were made through Mr. Gray's office? A. That is right.

Q. And before coming here and testifying you spoke to Mr. Gray about it, did you not? A. That is right.

Q. And you told him substantially everything you told 260
from the witness stand?

The Court: Everything what?

Q. Substantially everything you told from the witness stand. A. Well, I told him some things.

Q. It was substantially the same, that is, you hadn't changed anything by reason of the fact that I called you instead of Mr. Gray? You haven't altered any of your testimony? A. That is right.

Q. It was substantially the same that you told Mr. Gray before I ever spoke to you except over the phone? A. That is right.

261

Mr. Gray: May I ask if Mr. Rassner claims that this vessel was not owned by the United States at the time covered by the complaint?

Mr. Rassner: I will answer that. I say it is incompetent, irrelevant and immaterial.

Mr. Gray: Well, then, I will just have to prove it.

The Court: I don't think there is any question Liberty ships were during the war owned, built, and paid for by the United States of America. As a matter of fact all of the shipping during the war.

Mr. Rassner: In view of your Honor's statement I will ask you to inform the jury that they are not

to be in the slightest concerned with that; it is incompetent, irrelevant and immaterial.

The Court: Disregard entirely what I say. I certainly am not a witness in this case. Never heard of it until yesterday.

Mr. Gray: I have no questions of the witness.

Mr. Rassner: That is all.

Mr. Gray: Now if the Court please, with respect to the testimony of Mr. Linnartz yesterday, in response to one of my objections your Honor reserved decision until I moved to strike out. I now move to strike out all the testimony by Mr. Linnartz relating to his alleged notice to the master that Mr. McAllister was ill prior to the 24th of November, and I call attention—

The Court: I will deny the application at this time. You can renew it at the end of the case sometime when we have got a more extensive picture of the whole situation.

Mr. Gray: I have another ground for that too. I addressed interrogatories to the plaintiff, the 30th being: "State (a) whether plaintiff reported his alleged injuries or illness to anyone on the vessel." The answer was "Yes."

"(b) State the names to whom such report is claimed to have been made."

The answer is: "The first assistant engineer and the purser."

Now I object after having filed these answers to proving indirectly through some other circuitous report notification to the master. If he was going to be frank about it he should have put it in his answer. For that reason I ask that you strike it out.

The Court: Motion denied.

Mr. Rassner: Mr. Bentz.

265

FRED A. BENTZ, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Rassner:

Q. Mr. Bentz, where do you come from? A. Cincinnati, Ohio.

Q. You came here at the expense and request of Mr. McAllister, is that right? A. Yes, sir.

Q. You have been here the last few days awaiting this trial? A. Yes, sir.

266

Q. Were you any particular friend of Mr. McAllister prior to your employment aboard the Haines? A. Never saw him before.

Q. And during your employment aboard the vessel were you in particularly close association with him? A. No, sir. He was an officer and I was a member of the crew.

Q. You were in a different department entirely? A. No, I was in the crew, engine, but he was an officer.

Q. And you didn't commingle? A. No, sir.

Q. What was your job on the Haines? A. I was deck engineer.

Q. Who was your employer? A. Well, Cosmopolitan.

267

Mr. Gray: Objected to as calling for a conclusion of law.

The Court: Overruled.

Q. Who was your employer? A. Cosmopolitan Shipping.

Q. As far as you know? A. As far as I know, sir.

Q. Did you ever see this stamp on the articles, Defendant's Exhibit A, when you signed on? A. No, sir, I didn't pay much attention to it.

Q. Do you remember seeing that before, that stamp, referring to— A. Well, not on that, sir.

268 *Fred A. Bentz—Direct.*

Q. Referring to your being employed by the United States Government. Did you see that before? A. Well, not on there. I don't recall it, sir.

Q. Now when did you join the vessel, do you recall, or do you want to look at the articles? A. I think it was on July 19th. I may be wrong. I better look at it. (Looks at paper.) That is the day we signed the articles.

Q. What date is that? A. That is the 23rd.

Q. The 23rd of July 1945? A. That is right.

Q. After looking at the articles your recollection is
269 refreshed? A. Yes.

Q. Do you know when you signed off? A. Well, when the rest of them did. It is on there. About the 30th of August—no, better look on there. July?

Q. Do you know where your name is on this? A. I think it is 22. Here it is right here (indicating), 23.

Q. 23, and that would give you the date of signing off? A. No, that isn't it. The eighth month, the second.

Q. 1946? A. Yes.

Mr. Gray: What is the date?

Mr. Rassner: August 2nd, 1946.

270 Q. Now you told us what duties you had? A. Deck engineer.

Q. What does that mean? A. To take care of deck machinery, plumbing, odds and ends, whenever I get orders from the first assistant.

Q. Did that include the water fountain? A. That is right.

Q. Then you would know where it was? A. Oh, absolutely.

Q. You would know where all the water fountains were on that vessel? A. Yes.

Q. Tell us how many there were on the vessel? A. Well, one on the main deck and one in the engine room.

Q. The one on the main deck, was that used by anyone in particular? A. Well, everybody.

Q. Who do you mean by everybody. A. Everybody that wanted a drink had to use it.

Q. Do you remember being down at Shanghai? A. Yes, sir.

Q. Do you remember about when that was? A. Well, the exact date, you better check that log.

Q. Approximately when? A. Well, September and October, November.

Q. You remember being down there during the latter 272
part of 1945, including the months of September, October and November generally? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Do you remember taking on any passengers at Shanghai? A. Well, I saw them come aboard.

Q. About how many did you see come aboard? A. I don't know. That is not much of my business, that part. I would say approximately—passengers? You mean including the truck drivers?

Q. That is right. A. Well, I would say a hundred. Around a hundred approximately.

Q. Were they Chinese? A. Yes. 273

Q. Did you see any coolies? A. Well, the coolies were all loading the ship.

Mr. Gray: This is all leading. Why doesn't the witness testify.

The Court: Yes.

Q. Did you see other individuals? A. Do you mean people that sold things aboard the ship?

Q. No, you see, Mr. Gray objects to my suggesting who they were. You tell us all the people except members of the crew that you saw load the vessel? A. Well, say the coolies that were unloading.

Q. How many? A. There were so many to each hatch. I would say the same as the mate. He should know. Twenty-five to a hatch.

Q. Is that your estimate? A. That is right.

Q. Who else did you see come aboard the ship? A. There was a crew of Chinese that worked for the deck department, chipping, scraping, painting decks in the different passageways, and cabins along the alleyways.

Q. Wasn't that a little unusual?

Mr. Gray: That is objected to. That is clearly leading.

The Court: Yes.

Q. Is that in accordance with the established custom and usage of the trade?

The Court: That is leading, too. There is no distinction between that question and the other insofar as its being leading is concerned.

Mr. Rassner: I didn't want to waste too much time.

The Court: That is a waste of time.

Q. Do you know whether or not there is a custom in the trade with reference to the employment of men to do chipping, scaling and painting aboard a vessel? A. I imagine that is what they sign on for, their duties.

Q. Whose duties? A. Whichever they sign on under their articles.

Q. Who are you talking about? A. The crew.

Q. That is the work of the crew, is that right? A. That is right.

Q. And do you know of any custom in the trade where that work is done by any other persons other than the crew of the ship? A. Well, no, sir.

Q. That is the custom of the trade, is that right? A. Yes, sir.

Q. And do you consider it good practice to have other people come aboard the vessel to do the work usually performed by the deck department?

Mr. Gray: That is objected to as incompetent, irrelevant and immaterial.

The Court: Yes.

Q. All right. During the stay at Shanghai, China, were you aware of any unusual circumstances that prevailed in town? A. Well, orders were put on the board to watch your association with the Chinese, men and women, your eating and the uncleanliness that prevailed around the town itself, around the docks. 278

Q. Do you remember any particular disease that you were warned against? A. Well, there was quite a few—dysentery, cholera, polio.

Q. Do you remember if any officer of the vessel spoke to you or any other members of the crew about being careful of contracting diseases? A. The first assistant said "Watch yourself." He is the one that I get my—he generally talks to the crew. He is over the crew. 279

Q. Anybody else? A. Well, not to me directly, I wouldn't say.

Q. To the crew in general. Were you assembled—

Mr. Gray: That is objected to as leading.

The Court: Yes.

Mr. Gray: Practically every question is leading.

Q. When was that conversation? A. Before we had shore leave at Shanghai when we was docked.

Q. Tell us what the master said as near as you can recall? A. Well, it is sort of more or less of a general talk in ports. He said, "You watch yourselves."

Q. Do you remember whether or not the man spoke about any particular disease? A. Yes, I do.

Q. What disease? A. The three I mentioned.

Q. What were they? A. Dysentery, cholera, influenza, polio.

Q. When the various shore people were taken aboard the vessel, were toilet facilities provided for them? A. No, sir.

Q. What was done for their toilet facilities? A. Well, there was an outside toilet built on the deck for them.

281 Q. Subsequently, when the passengers were taken aboard the vessel was any structure put on the main deck? A. No.

Q. Well, I have in mind is, were there accommodations built on the deck itself for the various people? A. Well, this one outside toilet—this one shed or whatever you would say they put up.

Q. Who put it up? A. Well, I don't know. I would say the Chinese—I would say a shore lumber company put it on.

Q. In what part of the vessel? A. Near the No. 4 hatch, right after the No. 4 hatch.

Q. What was done to dispose of the refuse? A. They

282 had a fire hose.

Q. Where did it go? A. Right over the side of the ship.

Q. Was it covered up? A. No.

Q. It was right in the open? A. Yes.

Q. The drinking fountain that you speak of, was that used by the crew? A. Everybody.

Q. Including the Chinese coolies? A. Everybody on the ship.

Q. How about the crew's toilet facilities? By whom were they used? A. The same way.

Q. What do you mean? A. Anybody that could get by using it.

Q. Did you see any of the Chinese coolies using the

crew's toilet facilities? A. I run across many of them. I was one of the crew. I had to put up with all that.

Q. Was there any means provided to keep them out, such as a lock? A. 47 guys and you might have three keys. It is a little rough.

Q. In other words, there were—

By the Court:

Q. What did you say, forty-seven what? A. Whatever number you have in the crew.

284

Q. You called them guys? A. Well, fellow members of the crew. Whatever way you take it.

The Court: That is not a term of opprobrium anyway.

The Witness: That is right. I am a little on the minority for my vocabulary.

By Mr. Rassner:

Q. What did you observe of McAllister? A. I noticed he started to complain. As soon as anybody starts to complain I notice because I was all over the ship. I did 285 odds and ends jobs all over the ship, and I talked to him.

Q. Can you tell us about what you first observed? A. I can recall no regular date, but he started to complain of his stiff neck.

Q. How long before he left the ship. Have you any idea? A. Before he left the ship?

Q. Yes. What would be your best estimate. A. I don't know. We was in Shanghai for quite a while before we left. A couple of weeks I will say, sir.

Q. Is that your best estimate? A. Yes.

Q. You say that was before you left Shanghai? A. That is before we left Shanghai.

Q. And tell us what you observed? A. Well, the reason

I observed, I used to fall in for a couple of his jobs, and I didn't quite like it.

Q. Tell us about that. A. I sounded fuel oil up on the tank. It wasn't much doing but it more or less comes to me and I used to take care of that for him.

Q. Did he say anything about it? A. I figured there must be something wrong. Talking to him he started to complain. I used to go up in his room when he finally did get in bed. Well, he was sort of—I never did mingle with him on shore or on the ship. I was never friendly with him. I figure he never took much liking to me. When he
287 was sick I would go in his room and he didn't want to be bothered, didn't want nothing.

Q. How long before he was taken off the ship was he remaining in his room? A. Well, I don't know.

Q. What is your best estimate?

Mr. Gray: I object to that.

The Court: He said he doesn't know.

A. Before we left Shanghai he was in his room. He would go right up to his room and he would be done, he would be finished.

288

Mr. Gray: That is objected to, this characterization.

The Court: I will let it stand.

Q. I was wondering if you could give us an estimate approximately how long before he left the ship he was actually confined to his room? A. That I couldn't say. Before we left Shanghai I know through talking and I mean going to see him up in his room, that he was in bed.

Q. About how many days before you left Shanghai? A. A few days.

Q. And then where did you go from there? A. Do you mean when we left Shanghai?

Q. Yes. A. Up to North China, to Tsingtao.

Q. Where was he at that time? A. I had work to do. He was in his bed. I was no regular visitor to him.

Q. But you visited him on several occasions? A. I was up off and on. I used to go up to the first assistant to get my orders and he was next door to the first assistant. That is why I made it more or less.

Q. He was in his bunk at all times? A. Yes.

Q. What did you notice? A. I knew he had a stiff neck. When he was in his bunk I tried to help because I was big. I thought I could sit him up and take him out on deck or something like that, but he never wanted to be 290 touched.

Q. How long did that condition exist? A. Until he was taken off the ship.

Q. Up to the time—

Mr. Gray: I object to that as leading.

The Court: Yes.

Q. Did his condition change? A. No, I believe it got worse.

Q. It got worse from when to when? A. Oh, up to the day he left the ship, till he was taken off.

Q. Oh, incidentally, do you know whether or not there 291 were any other ships in the vicinity that had doctors?

Mr. Gray: Where?

Mr. Rassner: In the vicinity of the ship at any place.

Mr. Gray: Objected to as too general.

A. You mean in Shanghai?

Q. All right, I will make it specific. A few days before the vessel left Shanghai for Tsingtao. A. Oh, yes—

Q. When you first observed that Mr. McAllister wasn't feeling well at that particular time, were there any doctors

292 *Fred A. Benta—Cross.*

in the immediate vicinity as far as you know? A. Well, there was a hospital ship—two of them. One at anchorage was a Navy ship, the Repose, and there was an Army ship, the St. Olaf, tied up off our bow.

Q. Do you know whether there was a United States Army base across the river? A. Well, I don't know about that.

Mr. Rassner: That is all.

Cross Examination by Mr. Gray:

293

Q. How long have you been going to sea? A. Well, I don't know. November I think I joined. My first trip was about in April 1943.

Q. In April 1943? A. Yes.

Q. And from April 1943 you were in the Merchant Marine Service? A. That is right.

Q. Didn't you in that time know that all vessels flying the American flag were under the War Shipping Administration?

Mr. Rassner: Objected to.

The Court: Objection sustained.

294

Q. Did you have a trade when you were ashore? A. Yes, sir. I worked in the machine shop. That is the trade that I have.

Q. Will you please describe these water fountains? What type were they? Pressure, or what? A. Yes, there was pressure, I guess, off of one of the pumps downstairs in the engineroom.

Q. So the water spurted out of the fountain? A. Well, it come up so high (indicating).

Q. Indicating about— A. Just so you didn't get your face wet when you took a drink.

Q. And that is the way both fountains operated? A.

The one downstairs was more or less the same but nobody but the engine department on watch used that.

Q. It was a pressure fountain and anyone using the fountain wouldn't be contaminated?

Mr. Rassner: That is a medical question. I object to it.—

The Court: I think we can agree the engineers who built the ship would not provide that the water that ran down from the fountain would be re-used.

Mr. Rassner: Mr. Gray did not ask that common sense question. He asked about contamination. 296
I think it is common knowledge that anyone drinking from a—

The Court: Let's not have any argument. Is there a question?

Mr. Gray: Will you please repeat the question.

Q. (Question read.)

Mr. Rassner: I object to it as calling for a medical opinion.

The Court: I sustain the objection.

Mr. Gray: The question was interrupted, so I 297
will ask it again.

Q. This was a water pressure fountain and the water came up in a spout? A. Yes, sir.

Q. Was there any way that that would result in contamination of any person using it later on?

Mr. Rassner: Objection.

The Court: Objection sustained.

Q. Have you seen the fountains in various public buildings throughout the country of similar type? A. Well, more or less.

298 *Fred A. Bentz—Cross.*

Q. Did you see Mr. McAllister going ashore at Shanghai? A. No, sir.

Q. You don't mean to say he didn't go ashore at Shanghai? A. I never fooled with him. It was none of my business. He was a crew officer. We seldom mingle.

Q. How does it happen you went up to his room when you went to see the first assistant? A. I happened to be in charge of a shift—eight hours I was in charge of a running watch.

Q. That is why you went to see him? A. If he was sick,
299 if he was a dog, you more or less look at it because you become somewhat attached to it.

Q. You say when the vessel was in Shanghai he complained of a stiff neck? A. That is right.

Q. Did you give him any advice about going to a doctor? A. No, it is none of my business.

Q. The vessel sailed from Shanghai to Tsingtao on the 23rd of November? A. I don't remember. There is the log; I can tell you from that.

Q. After you saw him at Shanghai the ship sailed for Tsingtao? ? A. Yes.

Q. Do you know whether he stood his watches during that trip? A. You will have to look at the log.

300 Q. I asked if you know. A. I don't know.

Q. Whose duty was it to sound fuel oil tanks on board the vessel? A. The second assistant's.

Q. The second assistant's? A. That is right, as far as my knowledge. I may be wrong.

Q. Isn't that a crewman's job? A. No, not the fuel oil; sounding double bottoms for the water.

Q. What is the difference? A. Water and fuel oil. There is a little difference.

Q. They are sounded the same way? A. But it just goes under a different duty. I don't think you will get a crewman to sound oil tanks.

Q. When you say a crewman, you mean an a. b.? A. A. B., or an ordinary seaman.

Q. That is, in the deck department? A. That is right.

Q. Would you say a crewman in the engine department wouldn't sound fuel oil tanks? A. Who would you call a crewman?

Q. You have got wipers in the engine department? A. That is not their job.

Q. You have got oilers? A. Yes, sir.

Q. You have got firemen and water tenders? A. Yes.

Q. And none of them do that? A. The union book me on and you have your certain duties and if you perform them outside of that there is a slight—you get some overtime for it.

Q. Some remuneration for overtime? A. I think you find it is sometimes yes and sometimes no.

Q. You never missed a chance for overtime, did you? A. No, sir.

Mr. Gray: That is all.

Mr. Rassner: No further questions. Mr. McAllister—will you wait just one minute. I want to check with Mr. Bullis if I may have the Court's permission. He is from out of town and I want to know if it would make too much difference to Mr. Bullis if we kept him here for the balance of the day. Would it?

Mr. Bullis: No, sir.

Mr. Rassner: All right, Mr. McAllister.

ROBERT A. MCALLISTER, the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination by Mr. Rassner:

Q. Mr. McAllister, where were you born? A. Brooklyn, New York.

304 The Court: Where?

The Witness: Brooklyn, New York.

Q. You got your breath back. Speak up. Let us hear you back here. How old are you? A. Twenty-seven years old.

Q. Married? A. That is right, sir.

Q. Where do you live? A. 584 Manhattan Avenue, Brooklyn, New York.

Q. Whom do you live there with? A. My wife and two children.

305 Q. How long have you been going to sea? A. Approximately since July 11th, 1941, up until December 2, 1945.

Q. What education have you had? Start with your public school education. A. I graduated from St. Anthony's Grammar School.

Q. Where is that located? A. That is located in Greenpoint, Brooklyn, in the same neighborhood as my address. Then I continued on to high school for two years.

Q. Where? A. Eastern District High School. And then my formal education finished with that up until during the war I went to Government schools, supervised by the Government, which I graduated from, and in time became

306 a marine engineer.

Q. When did you stop going to high school? A. I was approximately fifteen years old.

Q. What did you do then? A. Then I went to work.

Q. Doing what? A. I worked as a messenger for a printing company. I went to continuation school one day a week until I reached the required age of seventeen or eighteen, I believe, then I continued on different jobs until the war broke out or until before the war broke out with the United States. Then I entered the merchant marine.

Q. What I am trying to find out is what type of jobs you had up until the war broke out? Was it manual labor? A. Yes, part of the time. At that time things were pretty hard; you took what you could get.

Q. What? A. Stevedoring and loading.

Q. Then when the war broke out what did you do? A. Before the war broke out—it was on in Europe—I joined the merchant marine.

Q. Do you know about when that was? A. Yes. That date was July 11th, 1941.

Q. And have you been going to sea ever since then up to the time you were disabled? A. That is right.

Q. And you have had some marine education, haven't you? A. That is right.

Q. When was that? A. About May or June of 1944 I 308
applied for Officers Candidate school in New London, Connecticut, as I had the required requirements.

Q. Were you accepted? A. I was accepted.

Q. How long did you go to that school? A. I went approximately four months and then they put me on detached duty. They sent me down to New York to get a ship and get back to sea.

Q. Do you hold any licenses? A. At that time I held a third assistant's steam license and a third assistant's diesel license.

Q. Did you subsequently acquire other licenses? A. Yes. When I put in the required sea time to be upgraded, I entered a school in New York. 309

Q. About when was that? A. About July of—no, before July—maybe about June of 1945 I entered an upgrading school here in New York and I received my second assistant's steam license.

Q. What ships? A. Any ships.

Q. What oceans? A. Any oceans.

Q. Unlimited? A. Unlimited license.

Q. Is that the type of job you got aboard the Haines? A. That is correct.

Q. By whom were you employed when you joined the Haines?

310 *Robert A. McAllister—Direct.*

Mr. Gray: That is objected to. It is a conclusion of law. I think the proper way to prove it is to show signature on the articles. I object to this as not the best evidence.

The Court: Objection sustained.

Mr. Rassner: I would like to be heard on that if I may?

The Court: I don't want to hear you. You can put in the facts. The question you asked calls for a conclusion.

311 Mr. Rassner: I would consider it a conclusion of fact and not of law, however.

Q. Tell us the method, the manner and the circumstances under which you obtained employment aboard the Haines? A. I went down to the union hall on Fulton—

Q. What union hall is that? A. That was the marine engineers union hall. I went in there and I saw on their board—which was the customary way they did it; they put up the ships that had vacancies and the type of engineer they wanted, and I saw an assistant engineer on a ship for the Cosmopolitan.

312 Mr. Rassner: I did not get that. (Record read.)

Q. Cosmopolitan what? A. Shipping Company.

Q. When was that? A. That was approximately about July the 19th of 1945.

Q. Tell us what happened after that? A. Well, when I saw the job and they gave me a slip in the union hall—

Q. Who did? A. The union dispatcher. He gave me a slip to report up to the Cosmopolitan Shipping office, which I did. When I got up there—

Q. Where was the Cosmopolitan Shipping office? A. This was at 42 Broadway, New York City.

Q. Did you look at the board downstairs before you

313

went upstairs to see whether the company was listed there? A. Oh, yes, I had to check to see what floor they were on.

Q. Was the name listed? A. That is right.

Q. Do you remember what floor? A. Not particularly, although I have been there since. I still don't recall the floor.

Q. In any event, you went up to the office? A. That is correct.

Q. Do you remember what name was on the door? A. I know it was Cosmopolitan Shipping or I wouldn't have probably walked in the door.

314

Q. Is that your best recollection, that the Cosmopolitan Shipping Company's name was on the door? A. I believe there was something else too.

Q. Was there anything about the United States—

Mr. Gray: That is objected to as leading.

A. That was on the door there, yes.

Q. You entered? A. Yes.

The Court: This is July 14th or thereabouts 1945?

The Witness: That is right, your Honor.

315

Q. And whom did you talk to? A. I talked to a purser. He was taking over for a personnel manager who was on his vacation.

Q. Did he say who he was? A. He said who he was and referred me to a port engineer.

Q. Who did he say he was? A. He was in charge of the hiring. He was taking over.

Q. For whom? A. For a man who I found out later was Mr. Moxey. I never met the man he was taking over for.

Q. Who did he say he was hiring for?

Mr. Gray: That is objected to.

The Court: Some other guy, I suppose.

The Witness: On the contrary.

A. Anyway, I surmised he was the man in power to hire me. He seemed to have that position. I didn't question him.

Q. Go ahead. A. He said he would refer me to the port engineer.

Q. Port engineer for whom? A. Evidently I imagine all this is for the Cosmopolitan Shipping Company.

Mr. Gray: I object to the imagining.

The Witness: I know. Who else would I be hiring for?

Q. In other words, you were in the office of the Cosmopolitan Shipping Company? A. Yes.

Q. And you were talking to the man who was apparently in charge? A. That is right.

Q. What did he say to you? A. He said "Talk to the port engineer and fill out an application."

Q. What was your understanding? The port engineer for whom?

Mr. Gray: That is objected to.

The Court: Objection sustained.

Mr. Rassner: It is a question of the meeting of minds.

Mr. Gray: Your Honor, he can get this by putting the articles in.

Mr. Rassner: But the articles have been altered and I am suspicious of them.

Mr. Gray: I object. He has no business saying that.

Mr. Rassner: I think that stamp was put on later.

Mr. Gray: What makes you think so?

Mr. Rassner: Just for the defense of this suit.

The Court: All right.

Q. In any event, you spoke to the man who was supposed to be the port engineer? A. That is who I spoke to, the port engineer, that is correct.

Q. Do you remember his name? A. I did know it. I don't recall it now.

Q. Well, in any event, you spoke to the man who was supposed to be the port engineer. Where did you speak to him, at what place? A. At the company office.

320

Q. The Cosmopolitan Shipping Company's office? A. That is right.

Q. And what did he say to you and what did you say to him? A. He asked me to put down my particular experience on ships on an application, and when I did what he required he discussed it with me and then he gave me a slip and told me to report to the ship the next day, which I did, and then I entered the vessel. I believe I signed articles about July 20th—not signed the articles but I entered the vessel approximately July the 20th.

Q. From that conversation and from that interview what was your understanding as to who was hiring you? A. The Cosmopolitan Shipping Company.

321

Mr. Gray: That is objected to. That is a matter of law.

Mr. Rassner: It is a matter of fact, a matter of the meeting of the minds, the elementary law of contracts.

The Court: If you want to argue these law questions in front of the jury I am quite willing that you should. It would absolve—

Mr. Rassner: This isn't the first time I have tried these matters before your Honor. I am fully aware of your Honor's view. However, I am mindful that

it might be reviewed and I want to make my record.

The Court: That is all right, but you might as well make a good record. It is a bad one so far.

Mr. Rassner: I am doing the best I can.

Q. In any event, you went to the Haines, is that right? A. That is correct.

Q. And you got your job how? A. I reported to the chief engineer aboard the ship.

Q. What was his name? A. I believe Mjoen.

Q. Did you have any credentials to show your authority
323 for boarding this ship? A. Well, definitely; the company gave me a slip.

Q. What company gave you what slip? A. The Cosmopolitan Shipping Company gave me a slip.

Q. On their letterhead or something like that? A. On something like a pass.

Q. Who—

Mr. Gray: I object to that. He is suggesting a letterhead and—

The Witness: There was no letterhead used.

The Court: What is your best recollection?

324 The Witness: My best recollection is you don't need your licenses until you actually sign on, and so I just took a slip that they usually give at the union and you give it to the chief engineer and he accepts that as your active employment.

Q. That slip of paper that you got from the Cosmopolitan Shipping Company, did it have any name on it other than yours? A. Yes, it had the name of the company and the name of the vessel.

Q. What company? A. The Cosmopolitan Shipping Company and the name of the vessel the Edward B. Haines.

Q. Did it have anything else? A. My capacity, what

I was going to serve as aboard that vessel, second assistant engineer. 325

Q. Was it addressed? A. I reported to the chief engineer.

Q. You don't recall to whom it was addressed? A. No.

Q. In any event, you reported to the chief engineer and you got your job? A. That is correct, sir.

Q. And what was the job, as what? A. Second assistant engineer.

Q. Did you sign the articles? A. Not at that time. I signed them at a later date.

Q. Do you remember what date you signed them? A. 326
I believe we signed them about July the 30th or 31st.

Q. At the time you signed them, did they have this stamp, showing you Defendant's Exhibit A, and the stamp I have reference to is the stamp that says "You are being employed by the United States." Did it have that stamp on there at that time? A. I never particularly noticed it. I never saw it in fact, your Honor, if I may be permitted. We just sign right along the line. We don't question it.

Q. Do you recall seeing that stamp before today? A. I don't recall seeing that stamp before today.

Q. This is the first time that you recall seeing it? A. That is right, sir. 327

Q. The vessel sailed from New York, is that right? A. Yes.

Q. And eventually got over to Shanghai, China? A. That is right.

Q. When it got to Shanghai tell us what happened from then, as the vessel entered the port of Shanghai. Tell us everything that happened from then on. Tell it to the jury. A. When the vessel entered Shanghai there were notices on board the ship as far as I can recollect, or the captain told everybody that there had been diseases which was very prevalent in this area at that time, and my understanding was the diseases were influenza, dysentery, cholera, polio—diseases that were more or less adapted

328 *Robert A. McAllister—Direct.*

to those different ports. Then he told us to eat in only special places, not to mix with the Chinese.

Mr. Gray: Will you speak up. I can't hear you.

A. (Continuing) He told us not to eat in any Chinese eating places but just to go to the service clubs and Army canteens and anything operated by the United States Government that they was operating in those ports, to stay away from the Chinese. Well, we had that notification and then later on about when we hit there we knew there was
329 Chinese came aboard to unload the vessels, they came aboard to unload the vessels and they had hired men on the deck gang to do the chipping and painting, Chinese, and we took along some passengers, approximately a hundred or a little more. We had that one drinking fountain which was aboard the vessel which we all used, and I also saw them put the lavatory on the deck of the vessel for the use of the Chinese and we had a hose running into that to keep it clean. They had a habit of shutting that off, which caused a lot of trouble until a deck engineer got his orders to take the valve off entirely so they couldn't keep it running, and it had a stench all over the ship.

330 Q. Did you come in contact with that? A. Yes. The reason I particularly know that is, I was down in the engine room and we were using a fire hose to keep it cleaned out and I happened to notice the pump pressure was building up on it and actually I surmised there was a valve turned off somewhere and I went up on deck and I saw the valve shut off. I turned it on.

Then I had occasion for the oiler on my watch, he also went up for the same reason, and then he turned it off, and then the first assistant—I don't believe I gave the deck engineer any orders, but he removed the valve to keep the water going to relieve the stench aboard the vessel.

Q. Did you have occasion to do any work around those deck toilets on more than one occasion? A. I never had—

just had to go up to that valve at the toilet they built. That is the only one time I would go near them.

Q. Was that on one occasion? A. On two occasions. One time I did it myself and another time I with—

Q. In other words, you entered that toilet on two occasions: once you did work and once you supervised work? A. That's the idea.

Q. As to your own toilet facilities, were they exclusive for the crew or otherwise? A. Not at that particular time. It was a pretty hard proposition to keep all those Chinese under control. 332

Q. Every time you turned your back they were using your toilet facilities? A. Yes.

Q. Was there any means of locking the toilets? A. Yes, there was, but I don't believe there was enough keys to go around. Something on that order. I never saw them locked up.

Q. Who was your immediate superior? A. The first assistant engineer was my immediate superior.

Q. Is he in court today? A. Yes.

Q. Is he the man you got your orders from? A. That is correct.

Q. He is the man you reported to? A. That is correct.

Q. Did you have anything to do with receiving orders 333 from anybody else? A. Most of my orders were through the first assistant.

Q. Is that the established and customary practice of the trade? A. No. The established and customary practice of the trade is more or less to work directly under the chief engineer.

Q. Will you tell us why you didn't do that on the Edward B. Haines? A. At the beginning of the trip the chief engineer told me to report directly to the first assistant, and so I did so.

Q. And so you continued to report to the first assistant? A. That is correct.

334 *Robert A. McAllister—Direct.*

Q. Was there any difficulties between the chief engineer and the captain?

Mr. Gray: That is objected to as totally irrelevant.

The Court: Sustained.

Q. When did you first feel that you were ill? A. I noticed it about in Shanghai; I wasn't feeling too well before the ship left towards Tsingtao and a little while before that, but people knew I was sick. You feel you
335 actually have to go into bed. You figure you can do your work, you have to try your best to do it.

Q. There came a time when you didn't go ashore? A. Oh, yes, there came a time when I didn't go ashore.

Q. How long before you left the vessel was it that you had stopped going ashore? A. Approximately two weeks—before I left the vessel?

Q. Yes. A. That was about maybe two and a half, three weeks.

Q. Is that your best estimate? A. That is right.

Q. All right. Tell us the circumstances that prevailed that caused you to stay on board the ship instead of leav-
336 ing it? A. Well, I started feeling, I wasn't feeling quite well—a little burning sensation, stiffness in my neck. At that time it wasn't particularly enough—you couldn't actually fall down on the bed, but I wasn't well to continue with my duties.

Q. Did you speak to anybody about how you felt? A. I more or less let it be general knowledge. I spoke to the first assistant, and people would ask me, "How do you feel, Mac?" I just told them how I felt. If I felt better I would say so. But I couldn't eat. Those symptoms kept going on.

Q. How long did that condition continue before you actually went in to your bed? A. I actually went into my

bed about a week and a half before I was taken off the ship.

Q. How long did these symptoms continue before you went to your bed? A. Oh, they continued for probably ten or twelve days.

Q. During those ten or twelve days did you have any discussions about your work with any of the other crew members?

Mr. Gray: That is objected to as immaterial. I don't see what that has to do with this case.

The Court: Overruled. 338

A. Why yes, I was getting so I didn't have the ambition that I otherwise would have to take care of my job as I should have, and I was detailing it on to the fireman, deck engineer, and a few of them had a shot at doing jobs that ordinarily I should have done.

Q. Were any complaints filed against you with the chief engineer for your failure to do your work? A. It came back to me that there was.

Mr. Gray: That is objected to. We don't claim anything like that. 339

Mr. Rassner: On the question of notice to the chief engineer, may I be permitted to continue?

The Court: You may continue provided you ask questions that will bring out something more than he just stated. I think that should go out.

Mr. Gray: I object to any—

Q. Did you have any conversation with the—

Mr. Gray: I am making an objection.

Mr. Rassner: I am not pressing that question. I withdraw the question.

Q. Did you have any conversations with the chief engineer after you took ill? Yes or no. A. No, I didn't.

Q. Did he ever call you? A. No.

Q. Did you have any conversations with the first engineer? A. Yes, I did.

Q. What is his name? A. Floyd Bullis.

Q. That is the gentleman in court? A. That is correct.

Q. What did you say to him and what did he say to you, and give us the time when the conversation took place?

Mr. Gray: That is immaterial and not binding on the defendant.

Mr. Rassner: I think it is.

The Court: Overruled.

Mr. Rassner: I think it is quite binding on the defendant. It is his superior.

The Court: Overruled.

A. Yes, I did talk to the first assistant about it a couple of times.

Q. How long before you actually went into your bed did you talk to Mr. Bullis about your physical condition for the first time?

Mr. Gray: That is objected to as leading. He should have asked him when he first heard—

The Court: Objection sustained as leading.

Q. When did you first talk to Mr. Bullis? How long before you were confined to bed?

Mr. Gray: I object to it now on the ground that the answer was suggested by the prior question.

The Court: No, I will let him answer.

A. Before I was taken off the vessel?

343

Q. No, no, before you went to bed. A. Before I went to bed I used to come in off my watch and go to bed every chance I had.

Q. What I have in mind is, before you were actually confined to your bed—how long before that was this conversation? A. A matter of one and a half to two weeks approximately.

Q. Where did the conversation take place? What part of the ship? A. It was in the saloon.

Q. Do you remember about what time it was? A. I know it was daytime.

344

Q. And what did you say to him and what did he say to you? A. At that time I told him I didn't feel too well, and he asked me if I wanted him to stand my watches, you see, which is customary at that time if you don't feel well, someone can stand your watch and then you pay them back at a later date when you feel better, more fit for your duties.

Q. Who gets the credit for standing watch? A. The sick person gets the credit.

Q. Regardless of who stands watch? A. Regardless of who stands the watch. So I reported at that time, but it was a matter of shore leave for the other fellows involved and I didn't know exactly how ill I was going to be. When it started, I thought it was a touch of a sore throat and I didn't feel well, so I went on standing watches a little after that.

345

Q. About how many times did you have conversations with him before you actually were confined to bed? A. Whenever we ran across each other. It was beginning around that time when I was still walking around and when a seaman would ask, "How do you feel?" and then I used to go off my watch and go right to bed, they would become more alarmed, and naturally they would ask me more.

Q. How long before you were confined to bed would you go off watch and go right to bed? A. About five to six days.

346 *Robert A. McAllister—Direct.*

Q. Now when you were actually confined to bed—you say that was about a week and a half before you went off the ship?

Mr. Gray: He didn't say that.

Mr. Rassner: If he didn't say that I would like to have the record read to refresh my recollection.

The Court: What is your best recollection? I thought it was—

The Witness: It was a week and a half, that is right.

347 The Court: Before you were taken off the ship?

The Witness: That is right.

Mr. Rassner: That was my recollection.

Mr. Gray: A week and a half from the time he was confined to bed to the time he was taken off the ship.

Mr. Rassner: That is right. That is my recollection.

Q. During that week and a half before you were taken off the ship, who visited you in your room? A. The first assistant visited me.

348 Q. Who else? A. The purser.

Q. Who else? A. I saw the chief engineer, the chief mate, the deck engineer, my oiler, the fireman watertender on my watch, one of the wipers walked in, third mate—oh, quite a few dropped in.

Q. You tried to get all of these men to come to court here, that is, through your attorney?

Mr. Gray: That is objected to. He can't tell—

The Court: Objection sustained. We will take a recess for a few minutes.

(Short recess.)

Q. Now when the first assistant spoke to you—can you give us the date of that—the first time?

Mr. Gray: About what?

Mr. Rassner: About anything.

Mr. Gray: That is objected to as too general.

Mr. Rassner: All right, I will withdraw the question.

Q. Approximately how long before you were actually confined to bed did other people start taking your watch, if at all? A. Before I was confined— 350

Mr. Gray: That is objected to. He said that other people didn't take his watch; he carried on himself.

Mr. Rassner: I withdraw the question.

Q. Did anybody stand any of your watches before you were actually confined to bed? A. I don't believe they did.

Q. I see. So the first time they started standing watches for you was after you were actually confined to bed, is that right? A. That is correct.

Q. And you would sign for those watches, is that 351 right? A. That is right.

Q. And so actually, although the records show that you were standing your watch, you make no claim that you did stand your watch after you were actually confined to bed? A. That is right.

Q. You had no conversations with the chief engineer about your condition at all?

Mr. Gray: He has already said he didn't.

Mr. Rassner: That is what I am asking.

Mr. Gray: Let us not repeat it. This is going to be a long trial.

352 *Robert A. McAllister—Direct.*

Q. Is that correct? A. That is correct.

Q. What conversation did you have with the first assistant engineer? What did you say to him and what did he say to you?

Mr. Gray: Objected to unless he states the occasion on which it occurred.

The Court: Overruled. When and where?

A. It was in Shanghai—it was in the saloon, and I think there was a meal on the table around this time.

353 Q. When you say the saloon, you are talking of what? A. The officers' mess aboard the vessel. I mentioned it then, I didn't feel too well. In fact I started to lose my appetite around that time, I didn't feel like eating, I didn't feel like eating that food. That was the first occasion I had to talk to the first assistant about it.

Q. What did he say to you and what did you say to him? A. He said to me—I believe I was due for a night watch that particular day, and he asked me if I wanted him to stand my night watch. I said, "No, I believe I can manage the night watch." I didn't feel good but I felt it would pass over. I didn't know how sick I was

354 going to be. There was no sense having someone take my watch for me. So that was about all that was said.

Q. Did you have any further conversations with him? A. Yes. During the course of the day he would ask me day by day how I was feeling and these symptoms started to progress more and more.

Q. During that week and a half before you were actually confined to bed, did you have any conversations with any officer about your condition? A. Only the ones that came to my cabin to see me.

Q. Were you here when the chief engineer testified as to his conversations with you? Were you in court? A. Yes, I was in court.

355

Q. Did you hear him? A. Yes.

Q. Is there anything else you can add to what he said or has he told substantially everything that took place? A. He was asking me how I felt. I told him I wasn't feeling too good and I was starting to get these symptoms that became—

Q. Did you speak to any other officer besides the chief engineer and the first assistant engineer? A. Oh, yes, the purser. He was called in.

Q. When was he called in? A. The date? I don't recall the date.

356

Q. Was it during that week and a half? A. During the period when I was confined to bed.

Q. Was he called in before you were confined to bed is what I am trying to find out, or after? A. When he came in to see me it was really to check up on me during the time I was confined to bed.

Q. Did you have any conversations with him before that time? A. He knew generally.

Mr. Gray: That is objected to.

The Court: Yes.

357

Q. Did you talk to him? A. Yes.

Q. About how many occasions during the week and a half before you were confined to bed? A. I imagine whenever we would run into each other.

Q. I want to know about how many times? A. Approximately three or four times.

Q. Well, that is your best recollection; it was three or four times during that week and a half before you were actually confined to bed? A. Yes.

Q. And of course when you were confined to bed he came in to see you? A. That is correct.

Q. Was it immediately? A. I don't recall.

Q. It was either that day or the day after? A. Yes, as soon as he possibly could.

358 *Robert A. McAllister—Direct.*

Q. It was rather prompt? A. Yes, as soon as he possibly could.

Q. You told him what was the matter with you? A. That is correct.

Q. Now the first time the purser saw you in bed, where was the ship at that time? A. It was getting ready to leave Shanghai.

Q. About how many hours before you left Shanghai would you say? Was it the same day or was it on another date? A. I think it was the same day because at that
359 time the ship was getting organized and that is why particularly it was brought to his attention. Usually when a ship is in port everything is pretty well disorganized with loading and taking on men and all that.

Q. What is your best recollection as to approximately how may hours before the ship actually sailed that the purser was in your room inquiring about your condition?

Mr. Gray: That is objected to. There is no evidence he was inquiring about his condition.

The Court: Well, talking to him.

Mr. Rassner: Talking to him.

360 A. The hours, I don't know. I know it was before the ship sailed.

Q. About how long before? A. I guess six or eight hours.

Q. When you say you guess, you mean that is your best recollection? A. That is my best recollection.

Q. From six to eight hours before the ship actually sailed the purser was in your room? A. That is right.

Q. Can you tell us substantially what he said and what you said at that time? A. He wanted to know how I was feeling and I told him. By that time I was maybe stiff in the neck and my face was paralyzed, I couldn't bite, and I told him the symptoms.

Q. Tell us what you told him? A. That is what I told him. 361

Q. What about your arms and legs? A. The left arm and the two legs had like a little burning sensation in them, going up and down. I couldn't bite and I had the symptoms of stiff neck which I couldn't turn around or up and down. That was the symptoms that I told him.

Q. Were you taking any food at that time? A. No, I wasn't taking any food at that time.

Q. Was anything mentioned about that? A. I told him I lost my appetite and I told him the general symptoms and general rundown conditions and weak, I couldn't eat. He knew I wasn't eating. 362

Q. What were you taking for sustenance? A. Well, they brought me a can of tomato juice. I believe the first assistant brought it. I didn't do much with that. I couldn't swallow it very well.

Q. Was that mentioned to the purser? A. I don't believe—it wasn't that particular day. He brought it up before that but I didn't mention that to the purser.

Q. In other words, you just made a general statement that you had no appetite, nothing specific? A. That is right. I thought I had to try to get something down.

Q. Were you taking any solid food at that time? A. No solid foods. 363

Q. How long had you not been taking solid foods before then? A. About two days or so.

Q. And who was bringing the juices that you had to you? A. Well, once the steward—the steward brought me the juice. Other people inquired if I wanted food and things but I refused.

Q. When you say the steward— A. I mean the chief steward.

Q. Is he the man in charge of the steward's department? A. That is correct.

Q. About how many times did he come to your room?

364 A. He brought the juice up. One time he brought quite a large can and then he came back again to ask me if I wanted anything else. I told him no, I couldn't get it down anyway and if I did want something I would notify somebody to get me some food if it later developed that I could consume it.

Q. And this was one or two days before you left Shanghai? A. That is correct.

Q. Within two days? A. That is correct.

Q. Then the vessel sailed for another port? A. That is
365 right.

Q. What port? A. Tsingtao, North China.

Q. How long a voyage was that? A. A matter of a day and a half, two days—something around there.

Q. Did you get out of bed then? A. No.

Q. Did you get out of bed at all up to the time you were taken off the ship? A. No.

Q. And when you were first confined to bed, about a week and a half before you were taken off the ship, what were your symptoms besides your stiff neck, inability to swallow, dizziness—those symptoms which you mentioned? Anything else? A. Well, the paralysis to the face was very noticeable before I was confined to bed. I wasn't eating,
366 you see. I had that symptom. Outside of the ones I mentioned I don't think I had any others.

Q. How many times did the master come to see you during your illness? A. I didn't see the master.

Q. Did he come at all? A. No.

Q. How many doctors came to visit you? A. No doctors.

Q. Were you taken off the ship to see a doctor before you were removed to the hospital? A. When I was taken off the—

Q. No, no, before you were taken off the ship to the hospital? A. Oh, no, I didn't see no doctors.

Q. Did the master at any time send word to you that he was getting a doctor for you? A. No.

Q. Did any other officer say that they were getting a doctor for you? A. Well, there was talk about it, that they were going to get one for me.

Q. When did that talk start? How long before you were taken off the ship? A. About eight or nine days before I was actually taken off the ship.

Q. That is your best recollection that it was eight or nine days before you were actually taken off the ship that you were informed that a doctor would be provided? A. That is right.

Q. Will you tell us who told you that? A. I don't think 368
he said that the doctor would be provided.

Q. I may have gotten the wrong impression. Just what was said and by whom about a doctor? A. I heard the chief mate, the first assistant and the purser mention the fact that they were going to have medical assistance come aboard the vessel to look at me.

Q. And that was about eight or nine days before you were taken off the ship to the best of your recollection? A. That is right.

Q. Was anything said after that? A. I understood even when we got to Tsingtao—

Q. When you say you understood, did anybody say any- 369
thing to you? A. During the course of conversation when they asked me how I felt, this time I was going lower and lower, I was getting pretty bad, I even thought myself I needed immediate medical assistance, and I got the understanding from what they told me that that was going to be provided.

Q. Who told you? A. The purser, the chief mate, the first assistant.

Q. They all told you? A. In the general conversation that was going on.

Q. Was that conversation in your presence? A. That is right. I was in the bed.

Q. Can you tell us substantially what was said by each

one of the men? I mean if you can recall. A. Just a general statement. They more or less came in to see how I was. I told them I wasn't feeling too well. In fact I thought I was getting worse. They said, "That is all right, we are going to have medical assistance for you." And the chief mate mentioned how he spoke to the skipper and the purser also, and the first assistant mentioned how "we will soon have medical assistance down on the ship."

Q. How many times was that conversation repeated before you were taken off the ship or the substance of that
371 conversation. A. Approximately about three times. As they knew there was going to be a notification made, they would drop it for a day or so and then they would see me in the bunk again and mention "You still here?" something like that.

Q. And during all the time that the vessel was lying at Tsingtao, no doctor came aboard the ship to see you, is that right? A. That is correct, no doctor came to see me.

Q. How were you feeling at this time? A. At this time I was feeling pretty bad.

Q. Have any pain? A. Yes, I had the burning sensation I described.

Q. When you say you had the burning sensation, what
372 do you mean? Can you compare it to anything? A. A burn on your finger, high fever. You imagine as if you are burning up.

Q. When you say burning your finger, what do you mean by that? A. When you accidentally burn your finger you sear the flesh a little bit and that spot becomes particularly tender. That is the feeling I had.

Q. On what part of your body did you have that feeling? A. In the back of my head.

Q. Indicating right behind the left ear? A. All the way down my body but the right arm.

Q. Do you mean that burning sensation enveloped the entire body? A. Yes.

Q. Except the right arm? A. Except the right arm.

Q. You had that burning sensation behind the left ear and your neck down the entire body, involving the left arm and both legs, but not your right arm? A. That is right.

Q. The way you describe it, it is like a burned finger except that it covered your entire body, is that correct? A. That is correct.

Q. What was given you to relieve your pain? A. I had a bicarbonate of soda.

Q. And who gave that to you? A. The first assistant engineer. 374

Q. Did that help you any? A. Yes, it did help in this respect: I always had that full sensation in my stomach like sickly nausea, and as soon as I drank that bicarbonate of soda I immediately vomited. That made me feel a little better.

Q. That gave you some relief insofar as your feeling of regurgitation was concerned? A. That is right.

Q. That was how long before you left the ship? A. Well, it was about five days before I left the ship.

Q. And before that you had this nauseous feeling for how long? A. Oh, I had that for about five or six days.

Q. In other words, that nauseous feeling started about ten days before you left the ship? 375

Mr. Gray: That is objected to. He didn't say ten days; he said five or six days.

Mr. Rassner: If my mathematics are wrong, I will let the jury judge.

The Court: You mumble your words. I don't know.

Mr. Rassner: As I understand the testimony of the witness, he said about five days before he left the vessel he was given bicarbonate of soda which helped him regurgitate and that nauseous feeling started about five or six days before then.

Q. Is that correct? A. That is correct.

Q. So that the nauseous feeling started about ten or eleven days before you left the ship, is that right? A. That is right.

Q. Was there any other treatment or any other medication given to you by anybody? A. No.

Q. Did anybody help you move around in your bunk or change your position? A. No. I didn't particularly care to have people moving me around.

Q. Tell us the reason for that. A. I was nervous with
377 people around me. I didn't want them touching me. I had a feeling of fear, afraid to have them touch me around this particular time there. I didn't want anyone doing that, moving me around in the bed or doing anything like that and that they carried through most of the illness even after I was off the vessel.

Q. You had that feeling of apprehension even until the time you entered the hospital, is that right? A. That is right.

Q. Apprehension of what? A. Of having people touch me.

Q. Were you in pain at the time? A. Yes.

378 Mr. Gray: That is objected to as leading.

The Court: He has already answered, I will let it stand.

Q. Did you notice anything about your muscles or their reactions? A. Slow—slow to react.

Q. What else did you observe? A. After a while they started to waste away.

Q. No; before they started to waste away was there any involuntary action? A. Well, spasms I had.

Q. That is exactly what I had in mind. I didn't want to lead you. Now tell us about those spasms. A. Involuntary movement of your muscles. They go something like that (indicating), you know; they jump. Without control.

You didn't have the control over your muscles you ordinarily would have.

Q. Now these involuntary spasms involved which parts of your body? A. My legs, my left arm, my body and face, back here (indicating).

Q. Indicating behind the neck and head, behind the left ear. Was this painful? A. Oh, yes, that was painful.

Q. Was anything done to relieve that pain? A. No.

Q. How long did that spastic condition continue before you left the ship? A. That was a matter of approximately two days when it really came on, when I start getting the 380
spasms.

Q. That was two days before you left the ship and you left the ship on the first, is that right? A. That is right, the first of December.

Q. That would bring it back to the 28th, is that right, the 28th of November? A. That is right.

Q. Did that spasm condition continue for any length of time after you entered the hospital? A. Continued for a little while.

Q. Was it a question of hours or a question of days? A. Well, it continued for about—well, two days sort of, a day or two.

Q. In other words, you had the spastic condition two 381
days before you left the ship, it continued on the 1st and continued for some time after the first, perhaps a day or two longer, is that right? A. That is correct.

Q. In other words, the spastic condition lasted about four or five days? A. That is correct.

Q. What was done for you at the hospital? A. Oh, at the hospital in order to diagnose my case, they made all kinds of examinations on me, a spinal tap, before they made sure of what I had. Well, they diagnosed me; I know they never did tell me for a while what I did have. The doctor later explained to me he didn't know how I would take it.

382 *Robert A. McAllister—Direct.*

Q. First let's find out how did you leave the ship? A. They sent a jeep converted into an ambulance.

Q. Did you walk or were you— A. I was assisted by corps men, that is, Navy men, on detached duty to the United States Marine Corps Hospital.

Q. How were your legs feeling at the time you were asked to use them to get off? A. Oh, weak. They felt pretty weak.

Q. How did you feel getting off? A. Weak, as I say. My legs were kind of rubbery, the control was going off them.

383

The Court: You did walk off, though, assisted by somebody else?

Mr. Rassner: That is right.

Q. How many people assisted you? A. Two.

Q. But you were assisted on your own legs? A. Yes.

Q. You used your own legs? A. That is right.

Q. You put the weight of your body on your legs? A. Yes.

Q. As much as you could? A. Yes.

Q. And did you exercise your left hand in holding on to anybody? A. Yes, I used both of them.

384

Q. No stretcher was provided? A. No, no stretcher.

Q. Did you have to go down a gangway? A. Yes, I went down a gangway.

Q. What did the gangway consist of? A. The usual gangway they put down a ship. A long raft from ship to shore, with little guide rails on it.

Q. Any steps? A. No, no steps.

Q. How long was this gangway approximately? How many feet? A. 35 or 40 feet, maybe.

Q. And how far did you have to walk from your room to the gangway? A. Oh, a matter of about thirty or forty feet.

385

Q. Did you have to walk down any stairs? A. Yes, I believe I did. I had to go down to the main deck.

Q. About how many steps? A. About fifteen.

Q. You weren't carried down those steps, were you? A. No.

Q. So you walked down about fifteen steps. That would be one flight or was it more than one flight? A. That was one flight.

Q. And then you walked approximately 30 feet to the gangway? A. That is correct.

Q. And you walked about 30 feet on the gangway, is that right? A. Approximately, yes.

386

Q. Then when you got to the foot of the gangway where were you? Were you on the pier? A. That is correct.

Q. How far was it from the pier to the converted ambulance? A. Oh, about ten feet.

Q. Did you walk that distance as well? A. I did.

Q. Were you lifted into the ambulance or did you have to try to climb in yourself? A. I was assisted into the ambulance.

Q. Did you use your own physical exertion? A. Yes.

Q. Did that include the use of your arms and your both legs? A. Yes.

387

Q. And your body? A. Part of my body.

Q. How did you feel when you were using your body? A. I knew I was going to a hospital. That is where I wanted to go.

Q. Did you feel any strain, soreness, pain, or were you comfortable? A. Not comfortable.

Q. How did you feel? A. I was feeling very weak. With the assistance I would just as soon have been able to have it done easier. But I was assisted in and I didn't feel any too well.

Q. What I want to know is, did this exertion change your physical condition? A. A little more exhausted.

Q. That is all you observed? A. That is all I observed.

Q. Now you were taken by this jeep to the hospital. How far was that? A. To tell you the truth I didn't pay much attention.

Q. How long did it take you to get from the ship to the hospital? A. Say approximately thirty, forty minutes.

Q. How did you leave the jeep to go into the hospital A. The same way.

Q. Again you used your own exertion trying to get out with the assistance of these two men? A. That is
389 right.

Q. How far did you have to go from the ambulance to get into the hospital? A. Well, they pulled up as near as they could to the door. I managed to walk up a few steps and then about thirty, forty feet.

Q. You weren't carried into the hospital? A. No, I wasn't carried into the hospital.

Q. You weren't put on a stretcher? A. No.

Q. You weren't wheeled in? A. No.

Q. You walked in? A. That is correct.

Q. Did that exertion have any effect on you as far as you could observe? A. Well, it did, but the way it all
390 summed up to me at that time was I didn't feel too well, I felt pretty bad, and as long as I was getting nearer to the hospital I didn't know how it affected me but I knew I was pretty tired when I got into the bed that day.

Q. It took place during the middle of this spastic period? A. That is right.

Q. Right in the middle of it? A. That is correct.

Q. When you got into the hospital what happened then? Where were you put? A. When I got into the hospital they gave me a bed, they put me on a bed.

Q. On what floor was that? A. I tell you I really don't recall.

Q. In any event, you were brought to your bed. Were

you lifted into your bed or did you climb into bed yourself? A. I was assisted to climb into it.

Q. In other words, you again used your own physical exertion to get into the bed? A. That is correct.

Q. After you got into bed, were you undressed? A. Yes, I did get undressed.

Q. Did you do it yourself or did somebody do it for you? A. I was assisted.

Q. You were helped in undressing? A. That is correct.

Q. In taking your clothes off, is that correct? A. That is correct. 392

Q. Did that physical exertion have any effect on you? A. Well, I was happy to lay down. I lay down and then came the doctors and they started to put me through a pretty thorough physical examination to determine what the cause of this disease was.

Q. How long after the doctor saw you did you get the spinal tap? A. I don't recall if it was that day or the next day. That day I know I went through quite a—I believe it was the next day. I believe the purser and the captain were there at that time when I was receiving that spinal tap.

Q. Now let me ask you this: was there any physical aid given to you to relieve your pain when you got into the 393 hospital? A. Well, I received a hot water bottle and they wanted to give me morphine if I wanted it.

Q. Did you get morphine? A. No, I didn't get the morphine.

Q. You refused it? A. I did.

Q. And you say you had a hot water bottle? A. Yes, I got a hot water bottle.

Q. To what part of your body? A. Right at the base of my spine here (indicating).

Q. And how were you fixed in bed? Were you just lying flat or was something else done for you? A. I was lying flat, just lying flat.

394 *Robert A. McAllister—Direct.*

Q. Did there come a time when you were given some splints or any other aid, or hot water or hot packs? A. Yes, that came at a little later date when I got out of Tsingtao.

Q. I can't hear you. A. When I left Tsingtao when they flew from Tsingtao to Shanghai aboard the hospital ship I received sand bags to keep my feet and legs lined straight and my feet up against the bottom of the bed.

Q. Tell us about this hospital at Tsingtao. What kind of a hospital was it? A. Well, Tsingtao was just a base
395 hospital for marines. In the makeshift hospital they had there they didn't have many modern facilities

Q. Was it in the nature of a first aid station? A. I would say it was a little more than that.

Mr. Gray: That is objected to unless he knows what that is.

A. It was more than a first aid station, I believe they was equipped to do more for you than first aid, but the facilities there—it was after the war.

Q. Suppose we take just one thing at a time. How many doctors were at that base? A. I don't know, but
396 about three of them looked me over.

Q. As far as you know, there were three doctors? A. That is correct.

Q. How many beds were in that hospital? A. I don't know about that, just that the ward I was in had about forty or fifty beds in it—the ward that I was continually in.

Q. And can you tell us by comparison with the hospitals that you were subsequently treated in, how this hospital was equipped? Did it have any facilities at all to treat you? A. No. I wouldn't say that this hospital in my estimation was equipped to treat anything for real good medical care.

Q. Did you see any facilities there to provide the treatment such as you got after you got into the United States

hospitals? A. Oh, no, I didn't see any facilities like that.

Q. How long were you at the Tsingtao hospital? A. I was there approximately seven days. I believe I left there December 7th.

Q. Who made arrangements for your leaving that hospital? A. As far as I know, the Navy.

Q. Did the master make arrangements? A. As far as I know it was the Navy.

Q. Did the master come to you and tell you he was making arrangements to have you flown to a modern hospital? A. No. 398

Q. Did the purser come to you and tell you that he had received instructions from the master or that he was going to arrange to have you flown to a modern hospital? A. No.

Q. I can't hear you. A. No, he didn't.

Q. You were flown from Tsingtao to where? A. Shanghai.

Q. At Shanghai what happened to you there? A. In Shanghai they put me aboard the hospital ship Repose.

Q. In other words, that was the very ship that had been in the harbor while you first took sick, is that right? A. That is right, it was anchored there.

Q. Now when you boarded the Repose was that a modernly equipped hospital? A. Yes, that was a very nice ship—I mean as far as medical treatment was concerned and things like that. 399

Q. What did they do for you there? A. Well, they put me to bed then, the doctor came around pretty often to see me for grippe and everything else, because by that time I couldn't walk at all and I was pretty weak all over and he used to ask to see my grip, what I could do, and my legs had no power and I could just barely move the fingers.

Q. By that time the spasm had ceased? A. The spasm was gone.

Q. What did they do for you at that hospital? A. They made me as comfortable as possible.

Q. In what way? A. They gave me a room to myself, and put me in isolation. They didn't want anyone coming near me that didn't wear the proper protection such as a mask and different things, and they tried to prepare special foods, tried to give me a chopped up diet and juices and milk.

Q. Hadn't you received all that at Tsingtao? A. No, I didn't receive that at Tsingtao.

Q. What kind of nourishment did you get there? A. They put a needle in my arm and I think it was glucose.

401 Q. You didn't get any actual food at Tsingtao? A. No. It was there. You could get it if you wanted it, but it was put in a pot and put into the center of the floor and everybody could help themselves to it.

Q. On the Repose they prepared a special diet for you, is that right? A. That is correct.

Q. Were you able to eat that? A. Swallowed a little of that.

Q. In any event, you did take some nourishment? A. That is right.

Q. By way of mouth? A. That is right.

Q. At that time you were weaker than you were at
402 Tsingtao? A. That is correct.

Q. But still you were able to eat the food they gave you? A. That is right.

Q. And you couldn't eat the food they gave you at Tsingtao? A. That is right.

Q. Although you were stronger at Tsingtao? A. That is right.

Q. Can you explain the fact why you were able to eat on the Repose when you were in a weaker condition, when you were not able to eat in the hospital at Tsingtao when you were stronger? A. The more modern facilities they had aboard that ship. They put me in a place by myself and they made me as comfortable as they possibly could, which was very comfortable, and they seen the condition

I was in, they cut my food up as small as they could possibly get it, and they used to have someone come and assist me because at this time I couldn't sit up and then they used to feed me.

Q. Did anybody come to feed you at Tsingtao? A. No, except there was a marine. He was sick, but he could walk around. He asked me what I particularly wanted, if I wanted anything.

Q. But as far as the hospital was concerned, no special arrangements were made for special food and arrangements to have an attendant help you? A. That is right.

404

Q. How long did you remain aboard the Repose? A. Ten days, I believe, to the best of my recollection.

Q. Are you acquainted with the Sister Kenny methods of treatment? A. At that time?

Q. Now. Are you acquainted with it now? A. Oh, yes.

Q. Did you get that treatment at any time? A. No.

Q. You never got that treatment? A. No, I never got the Sister Kenny treatment.

Q. When you got to the Repose you say the spastic condition had disappeared, is that right? A. That is right.

Q. Were your arm and legs immobilized at that time in any way? A. At that time I couldn't do anything.

405

Q. Were any splints put on you while you were on the Repose? A. I believe they used the sandbags for my legs to keep my legs straight.

Q. Did you receive penicillin? A. Yes, I did. I received that in Tsingtao. I received penicillin the first couple of days.

Q. Now, from Shanghai where did you go next? A. They flew me to Guam—the Navy Department, they took me off the Repose and put me on an airplane and flew me to Guam.

Q. How long were you at Guam? A. I stayed in Guam, I imagine it was a matter of a week because I know I left there New Year's Day in 1946.

406 *Robert A. McAllister—Direct.*

By the Court:

Q. When did you say you left Shanghai? A. When did I leave Shanghai?

Q. Yes. A. I left Shanghai—

Q. That is, this hospital ship that you call the Repose? A. Yes, that is right, I left approximately around the 17th of December.

Mr. Rassner: The exact date, if I may have the record, shows it is December 18th. You were within
407 one day anyway.

Mr. Gray: I think your records should be put in evidence.

Mr. Rassner: I offer these records in evidence.

Mr. Gray: No objection.

Mr. Rassner: Thank you for the suggestion, Mr. Gray.

(Marked Plaintiff's Exhibit 5.)

Mr. Rassner: In view of the fact that these hospital records are in evidence, I am not going to ask the witness about his subsequent treatment except generally.

408

By Mr. Rassner:

Q. From Guam you went to where? A. From Guam I went to San Francisco, Marine Hospital in San Francisco.

Mr. Gray: By air?

The Witness: No, by ship.

Q. What ship were you taken by? A. I believe you will have that in the records. I just don't recall.

Q. Who provided for your shipment by sea back to the States? A. The Navy. As far as I understand it was a Navy vessel.

Q. Did the master tell you anything about what provision he was making for getting you back to the United States? A. No, he didn't.

Q. Did anybody representing the Cosmopolitan Shipping Company, Inc., come to you and speak to you about the means of getting you back to the United States? A. Not that I recall.

Q. In any event, you were informed by someone that arrangements had been made for getting you back to the United States by ship, is that right? A. That is right.

Q. And how long did it take you to get back to the United States? A. From when I first became ill? 410

Q. No, from the time you left Guam? A. From the time I left Guam it took me seventeen days until I reached San Francisco.

Q. What treatment did you get on board the vessel? A. No treatment aboard the vessel.

Q. So during these seventeen days you were without treatment at all, is that right? A. That is right.

Q. Were your arms or legs immobilized in any way? Were splints put on you? A. Not on the ship, no.

Q. Where? A. In Guam. They had added sandbags to keep my legs straightened out.

Q. How about splints? A. No splints. 411

Q. Or casts? A. No casts.

Q. And while you were on the ship you were without any splints, without any sandbags; just left in your bunk, is that right? A. That is right.

Q. Any doctor visit you on board the vessel? A. There was a doctor going back that was ill himself. I used to speak to him.

Q. That is the only treatment you got? A. That is right.

Q. He gave you no examination? A. No, he didn't.

Q. He didn't treat you? A. No.

Q. You got no treatment aboard the vessel? A. None at all, that is correct.

Q. When you got back to San Francisco, were you taken to a hospital? A. I was.

Q. Which hospital? A. The marine hospital in San Francisco.

Mr. Rassner: I have here a summary of the marine hospital records in San Francisco, and by consent I at this time offer them in evidence.

(Marked Plaintiff's Exhibit 6.)

Q. Tell us generally in your own words what treatment
413 you received at San Francisco Marine Hospital? A. Well, when I entered San Francisco Marine Hospital they immediately gave me a physical examination. They already knew what I had and they all wanted to see how bad it was. Immediately they started treatment on the Sister Kenny method.

Q. Will you speak up? A. Immediately they started treatment on the Sister Kenny method and that continued for quite a while, until I left there in fact. After I was there about two or three months and coming along a little better I desired to come to the East Coast where I would be near my family, and where my wife could visit me, et
414 cetera. I contacted the agents for the union official of that particular local in San Francisco. I believe his name was Mr. Casey, but I am not quite sure, and he told me he will make arrangements to get me flown back.

Mr. Gray: I object to what Mr. Casey told him.

The Court: Yes.

A. I told him that I wanted to get to the East Coast and get back, now that I felt a little stronger, to be back near my people. He told me he would attend to it. He also said that he would see if he can get some money for me that he believed was still coming to me from the company,

which he did. He was attending to it, I spent some time there, and I was then flown—

Q. May I interrupt you. You are leaving the West Coast hospital, but before that, we would like to know what was done for you. You tell us the Kenny treatment. Will you tell us what your understanding is of the Kenny treatment? In other words, what was done for you at the San Francisco hospital? A. In the San Francisco marine hospital they took a board and put it under the bed that I was going to lay on, to make it very hard, and they put a little blanket over that. They didn't want sheets or anything 416
that would hold the cold to be in contact with me. Over that they put a heavier blanket. They straightened out my leg with sandbags. At the foot of my bed they had a foot rest and if I slide or through the weakness of my limbs come off, they would straighten it out. The reason I understand they did that was to prevent me from having a dropped foot. In other words, getting different disabilities. If they can catch you quick enough, from my understanding of this treatment, they will eliminate many of them. That is the type of treatment. Then in the morning and in the afternoon I would be taken downstairs in the hospital to the physiotherapy department and this time I would be sub- 417
jected to hot baths at certain temperatures. Then the Sister Kenny method, they had a little machine which they filled up with different pads cut to fit different parts of your body with different wool which kept the heat in your body better than any other material, from what I understand, and they put it in, this heating unit, which was electric with water, and would bring it up to a desired temperature and there must have been some kind of a centerfuge in there and they would turn the switch and that would whirl around and around, water would be eliminated and although it was very hot, the chance of a burn was very slight, and they would wrap them around you as much as you could stand and they continued that treatment at the San Fran-

418 *Robert A. McAllister—Direct.*

cisco marine hospital until I was flown to the East Coast. That was substantially the treatment that I received in the San Francisco marine hospital.

Q. Did you get any splints or immobilization at the San Francisco Marine Hospital? A. Well, they didn't believe in that method from what I understood.

Q. In any event, they did not use any splints? A. That is right.

Q. They continued exclusively with what you call the Sister Kenny treatment, is that right? A. That is correct.

419 Q. What is your normal weight? What did you weigh before you took sick? A. Oh, I imagine I have been around 170—weighed variously—approximately 170.

Q. What was your weight when you entered the marine hospital in San Francisco? A. To tell you the truth, I don't know. I haven't seen a check on my weight. I don't know what my weight was.

Q. You can't give us an estimate? A. I imagine I lost quite a few pounds.

Q. What is your best estimate?

Mr. Gray: I object to a guess.

Mr. Rassner: I am not asking for a guess. I
420 am asking for his best estimate.

Q. About how many pounds?

The Court: He doesn't know. I suppose you will find it in the hospital records if it is important.

Mr. Rassner: I didn't find it. That is why.

A. Say 140 pounds.

Q. You weighed about 140. Is that your estimate? A. That is what I would say, yes.

Q. O. K. Were you confined to bed all the time you were at the San Francisco marine hospital? A. That is correct, except for one time they tried to get me up.

Q. How did you feel while you were there? A. Well, I was feeling better. I was rid of most of that nausea and dizziness and all like that but of course I was paralyzed then. I couldn't move.

Q. When you speak of dizziness, had the dizziness continued right through the time before you were in the San Francisco hospital? A. No.

Q. How long did the dizziness last? A. It lasted until about the time I got aboard the hospital ship.

Q. The Repose? A. Yes.

Q. And how long did the nauseous feeling last? A. 422
Well, I kind of got rid of that when I vomited that time.

Q. How long did this sensation of your body having been burned last? A. Oh, that lasted for quite a long time. That lasted up until even past San Francisco.

Q. You mean when you left San Francisco? A. When I left San Francisco, when I had dropped that aversion to being moved and touched, but although the burning sensation itself was gone at that time, the fact that anybody moved you or touched you, seemed to bring it back and brought it back in that particular spot.

Q. In other words, if anybody would touch you you felt as if that area was being burned? A. That is it.

Q. And that was still present at the time you left San 423
Francisco marine hospital? A. No, I just about got rid of it.

Q. In other words, it lasted to within a few days of your leaving San Francisco marine hospital? A. That is right.

Q. And was that sensation of being burned and the feeling of being burned when somebody touches you, has that completely disappeared? A. Yes, that has gone from me completely.

Q. All right, fine. How were you taken from San Francisco? A. I was taken by an Army plane—I mean that is my understanding, it was an Army plane.

424 *Robert A. McAllister—Direct.*

Q. From where to where? A. You see, we made a few stops.

The Court: Well, you don't have to go into that. You landed down in the marine hospital in Staten Island, is that correct?

The Witness: That is correct, your Honor.

The Court: Somehow you got down there. You don't know whether you got there by plane—

The Witness: I landed at La Guardia Field.

425 By Mr. Rassner:

Q. Tell me, did the Cosmopolitan Shipping Company send any representative to see you while you were at the San Francisco marine hospital? A. Yes, they did.

Q. Who was it? Do you remember the name? A. No, I don't. I understand he was contacted by the union official, Mr. Casey, and he came to see me.

Q. When he came to you, did he arrange for any additional medication or observation by any other doctor? A. No.

Q. Did he discuss with you your treatment? A. No, no,
426 he was just discussing with me the matter—he mentioned he knew I was going to be flown across, and I believe there was some money involved in that. He wanted me to sign a pay voucher to give me some money.

Q. In other words, the total conversation that you had with any representative of the Cosmopolitan Shipping Company—

Mr. Gray: I object to it. It is leading right at the beginning.

The Court: Oh, yes. I don't know what you are driving at but there couldn't have been anything wrong in the Cosmopolitan Shipping Company sending or not sending a representative up. He was in

charge of the United States Government or the Army or the Navy practically all of that time, and then he was sent down here to Staten Island.

Mr. Rassner: Except that the Cosmopolitan wasn't breaking its neck—

Mr. Gray: I object to such a characterization. This man had the best of care.

Mr. Rassner: I am trying to prove that the Cosmopolitan wasn't breaking its neck.

The Court: I don't see anything to indicate that and I think it might shorten the case if there isn't 428
anything really that you are urging in that record to leave it out.

Mr. Rassner: I take exception to your Honor's comments.

The Court: You don't have to take exception.

Mr. Rassner: I know, but I merely call it to your Honor's attention that I don't feel that they are proper. It puts me to some embarrassment. I think it indicates the total disregard by the steamship company of human life. They just didn't care and that is part of my proof, that they didn't care when he first took sick and afterwards.

Mr. Gray: Who in a corporation should care? 429

Mr. Rassner: Do you want to put me on the stand?

The Court: I want to withdraw everything I said. I am sorry I said anything.

Mr. Rassner: I appreciate that. That is eminently fair.

Q. Did anybody else come to see you except the man who came down to have you sign a voucher for your money? A. Not from the company, no.

Q. Were any arrangements made as far as you know by the Cosmopolitan for any other treatment except that

which you received at the time from the United States Government? A. No, not as far as I know.

Q. You were flown back to New York? A. That is correct.

Q. You were admitted to the United States Marine Hospital at Staten Island? A. That is also correct.

Mr. Rassner: We have the marine hospital records.

The Court: I think we had better take a recess until a quarter past two.

(Recess until 2:15 p.m.)

Afternoon Session—2.15 P. M.

Mr. Rassner: May I have the Court's permission to call Dr. Frant?

The Court: No trouble at all.

Mr. Rassner: Dr. Frant, will you please step up.

Samuel Frant, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Rassner:

Q. Dr. Frant, are you a duly licensed physician and surgeon of the State of New York? A. Yes, sir.

Q. I believe we might save some time if you will forget your innate modesty and let's have all your qualifications on the record, if you don't mind. If you don't give them all, I will ask you about those you leave out. A. I have been graduated in medicine since 1921 and have specialized in public health ever since. I have been a member of the Department of Health of the City of New York since 1923, and I am at the present time a Deputy Commissioner of

Health. My specialty in public health is the science of the study of epidemics among which infantile paralysis is one. I have written articles on the subject. I am a member of societies dealing with public health, and I am on the staff of Columbia University Medical School teaching epidemiology, the science of the study of epidemics.

Q. Have you specialized in epidemiology? A. Yes.

Q. Will you tell us what polio is. A. Infantile paralysis or polio is a disease which is known as a communicable disease, that is, it is a catching disease which is caused by a germ which is called a non-filterable virus. A non- 434
filterable virus is a small germ too small to be seen in the ordinary microscope and it attacks the brain and the spinal cord of people and causes paralysis and in some instances death.

Q. Is that a contagious disease? A. Yes.

Q. How is it transmitted? A. It is transmitted in several ways: Probably from person to person by means of the mouth and nasal passages. It is also transmitted from a person who has the disease to a healthy person and from that healthy person to the person going to get the disease. It may also be transmitted by excreta, feces, and it may possibly be transmitted in water and in food.

Q. When you give us these facts, are you giving these 435
facts with a reasonable degree of medical certainty based on your experience? A. Yes, sir.

Q. Now, Doctor, assuming that during the month of November, 1945, the master of a merchant vessel known as the Edward B. Haines and at some time prior to the month of November and during the months of September and October, and on several occasions both the master and the chief mate from the time the vessel first docked or came to the port of Shanghai, China, advised the crew that there was contagious diseases ashore, including poliomyelitis or infantile paralysis, and both the master and the chief officer advised the members of the crew as to the need to

take precautions against commingling with people ashore and dining at public places, and assume further that the purser under the directions of the master caused to be posted throughout various parts of the vessel notices that there were contagious diseases known to be prevalent at Shanghai, including poliomyelitis, what in the exercise of reasonable prudence and caution should have been taken by a lay person such as a master who has been instructed in first aid and elementary features of administering first aid—what should a man in that position do to safeguard the
437 health of his crew, if anything?

Mr. Gray: Just a moment. What is the question? You are assuming something; now what is your question?

The Court: I didn't hear your question.

Mr. Gray: There is no question yet. All the attorney has given to the witness is assuming something. He didn't ask any question.

The Court: Yes.

Mr. Gray: He seemed to expect an answer without a question.

The Court: I guess the question is what the
438 master would have done or what should he have done.

Mr. Gray: I see. I object to the assumption in the hypothetical question on the ground that it contains the element that the master stated that there were contagious diseases ashore. It is my understanding of the testimony that he warned against certain acts in that there were contagious diseases on shore. I am not entirely certain on that.

The Court: I don't know that there is any definite testimony to the effect that the master knew that there was or that were these diseases.

Mr. Rassner: I didn't say a word in my hypothetical question about what the master knew or didn't know; I said that is what the master stated.

The Court: I will permit the question.

A. An intelligent man in charge of the ship should have seen to it that there was as little traffic as possible between the infected parts of the City and the ship.

Q. You say "intelligent man"; do you refer to the ordinary prudent person? A. Yes, sir.

Q. Now will you explain your statement to us and the reasons for it. A. If there is any communicable disease in an infected area, it is always wise to have as little traffic between that area and people who may be susceptible to the disease, because the disease can be transmitted from the infected area there by what is known as—in apparent cases, 440
that is, people who are going to get sick with the disease in the next day or so, or what is known as the carrier, and the carrier is a well person who carries the germs of the infection in his body and yet does not have any sign of the disease.

Q. Does the relationship between the number of people that board the vessel from an infected area have—I withdraw that.

Is there any relationship between the number of people coming aboard the ship and the danger or the degree of danger of exposure?

Mr. Gray: That is objected to on the ground 441
that it is too general because he must limit the question or apply it to a certain—

The Court: Read the question.

(Question read.)

The Court: All right. I don't understand the question. Perhaps he understands it.

Q. Would it make any difference whether a few people or a great number of people came from an infected area to the steamship Haines? A. Yes, sir, it would make a good deal of difference.

Q. Would you explain that, please? A. The fewer

442 *Samuel Frant—Direct.*

people that came from the infected area into the part—the region in which there were susceptible people—the fewer the people the less number of apparent cases or carriers, and the greater the number of people the more chance there would be of the spread of infection.

Q. Assuming that the law governing this ship requires the presence of a doctor aboard the ship when carrying 50 or more passengers, and assuming that 50 or more passengers were carried aboard the ship without a doctor aboard the ship, would you consider that good practice?

443 Mr. Gray: That is objected to. There is no foundation laid.

The Court: There is no foundation laid that I know of.

Mr. Rassner: Then I ask your Honor to take judicial notice of the fact that the United States Statutes require that a doctor board the ship—

Mr. Gray: I object to his stating what is in a United States statute.

The Court: I know there is some such statute, but whether it has any application to this situation I don't know. I doubt it.

444 Mr. Rassner: To eliminate any such doubt I will read the statute.

The Court: Without getting into any discussion I will permit the question subject to a motion to strike.

Mr. Rassner: I call your Honor's attention to Title 46 of the U. S. Code, Section 155, and ask the Court's permission to read it.

The Court: I will deny that application at this time. I will let him answer the question.

Mr. Gray: I also call your Honor's attention to the fact that the laws of the United States are inapplicable in Chinese waters.

Mr. Rassner: That is not the law.

The Court: I can see where we are going to—

Mr. Rassner: That is such a ridiculous statement.

The Court: I don't know whether you are charging that the statement I made is ridiculous or Mr. Gray's statement. If you are charging that mine is ridiculous perhaps you are justified.

Mr. Rassner: After all the years I have had of practicing before your Honor, I shouldn't think your Honor would assume that I would think anything you say is ridiculous. My respect for this Court—

446

The Court: All right. Now let's get along. We will leave out that question of laws for the present.

Q. Generally speaking, do you consider it good practice to have fifty or more passengers aboard a ship without any doctor in attendance?

Mr. Gray: That is objected to. We don't know what the conditions were. We haven't been shown by Mr. Rassner. And if this ship was under Army Control—

The Court: I will let him answer if he can. You can cross examine him about it. 447

A. As I understand the question, is it good practice to have a boat with fifty people with no doctor?

Q. That is right. A. The answer obviously is no.

Q. Will you explain the reason for that? A. I should think that any group of individuals is entitled to have the benefit of the counsel of a physician. Emergencies may arise at any moment and I should think that anybody would realize it is better to have a doctor than not to have a doctor if an emergency should arise.

Q. Now, Doctor, assuming that toilets were built on the main deck for the use of some hundred and fifty to two

hundred and fifty coolies including civilians and soldiers, longshoremen and laborers, and the means of disposal of the feces or stools was just to have it flushed over the side of the deck through a chute, would you consider that good practice?

Mr. Gray: That is objected to because my friend hasn't given him all the details about it.

The Court: I will let him answer.

A. No, it is not good practice.

449 Q. Will you give us the reasons for that? A. One of the most prolific sources of infection from person to person is the excreta from the bowel, the feces, the bowel movement, and any method of disposal of the excreta which is not a complete destruction lends itself to the spread of disease.

Q. Would a common drinking fountain aboard the ship be a competent producing cause of infection?

Mr. Gray: That is objected to. Mr. Rassner isn't giving this witness the fair treatment of describing this drinking fountain. I don't think the

450 jury or the rest of us—

The Court: I will let him answer if he can.

Mr. Gray: I object on the ground the type of drinking fountain hasn't been included in the question and therefore the question is immaterial and irrelevant in this case.

The Court: All right. If you can answer it. I don't see how you can, but—

Mr. Rassner: I will withdraw the question.

Q. Assuming that there was a drinking fountain aboard the vessel where the water came up under pressure so that it came out of the fountain to a height of about an

inch and a half and that fountain was used by all persons aboard the ship including those that were there to work, including the Chinese soldiers, including Chinese peddlers, including Chinese stevedores, and naturally all of the members of the crew, would you consider that good practice? A. I should just like to ask one question. Does the water go up straight or come down on the—

Q. It goes up a distance of an inch and a half. A. And then falls right down back?

Q. Falls right back. A. Any type of common drinking fountain that does not have the spout to go off at an angle is potentially dangerous. 452

Q. Would the fact that these people that I have mentioned, used common toilet facilities, be a source of infection? A. Yes.

Q. And was it good practice to have the various people coming from Shanghai to the vessel use the toilets which were used by the seamen aboard the ship? A. No.

Q. Now, Doctor, can you state with a reasonable degree of medical certainty that upon the master having informed the crew that there were amongst other diseases, infantile paralysis or polio in the Town of Shanghai, and assuming that between 150 and 250 persons came from shore aboard this ship and that they drank from the common water fountain which I have described before, that they used the toilet facilities which I have mentioned before, and assume further that they went all over various parts of the vessel, can you state with a reasonable degree of medical certainty that such conditions were a competent producing cause of having Mr. McAllister, who had been physically examined before he joined the vessel, and had not left the vessel for a period of approximately three weeks, would you say that is a competent producing cause of his contracting the disease of infantile paralysis or poliomyelitis? 453

Mr. Gray: That is objected to because there is no evidence that there was any poliomyelitis ashore at Shanghai. Secondly, because the period of two and a half to three weeks which Mr. Rassner just stated has been given no beginning or ending.

Mr. Rassner: In the first place, I didn't say two and a half to three weeks; I said three weeks. In the second place, I made no mention of the fact that I claimed there was or wasn't polio; I said that is what the master said.

Mr. Gray: And I object to it on the ground it is immaterial and irrelevant in addition to the grounds I stated.

The Court: Overruled. Will you read the question, please.

Q. (Question read.)

The Court: I don't know when that three weeks period commences.

Mr. Rassner: I think I had better amplify it.

Q. The three weeks period I have in mind is the three weeks before he was taken off the vessel in a semi-paralyzed condition, the date specifically being December 1st, 1945, that he was taken off the ship—that he had felt ill with a feeling of nausea and pain in his neck behind the left ear, that he had a feeling of weakness and general debility.

Mr. Gray: I object to the question upon the ground that the evidence of the plaintiff himself is that he hadn't left the ship for two and a half to three weeks which should be used in the question; secondly, I object because the time, relative time of his feeling this symptom behind the left ear is not stated. That is important.

Q. I will amend the question to cut it down to two and a half to three weeks. Now may we have the answer?

The Court: All right.

A. The answer is yes, if there was any infantile paralysis in the town of Shanghai.

Q. Now assuming that the vessel had had no cases of infantile paralysis up to the time that it came to the port of Shanghai—that was September, wasn't it—September 26, 1945, and had not left those waters until approximately the 24th of November 1945, can you state with a reasonable degree of medical certainty that there was polio in and about those waters, including the city of Shanghai? 458

Mr. Gray: That is objected to on the ground that the vessel had also been at Hong Kong between November 5th and November 7th.

Q. I will include that in my question, November 5th and November 7th. Exclude those two dates. It was in and about Shanghai with the exception of those two days.

Mr. Gray: It is very possible— 459

The Court: I will sustain the objection to the question.

Mr. Rassner: All right.

Q. Assuming that with the exception of —

Mr. Rassner: May I have those two dates?

Mr. Gray: November 5th and November 7th, 1945.

Q. Assuming that from the 8th day of November 1945, until the 24th day of November 1945, the vessel was at Shanghai, China.

Mr. Gray: I must object to that because the evidence showed that the vessel arrived at Shanghai on the 11th of November.

Mr. Rassner: I think Mr. Gray is right, November 11th. I withdraw the question.

Q. Assuming that there was no incident of polio aboard the vessel prior to the 11th day of November 1945, and that from November 11th, 1945, up to the 24th day of November, 1945, the vessel remained in and about the waters of Shanghai, assume that Mr. McAllister became ill with poliomyelitis, that he was confined to his bed within two or three days prior to the 24th day of November 1945, could you state with a reasonable degree of medical certainty whether or not there was poliomyelitis at and about Shanghai?

Mr. Gray: It is objected to. It is so speculative it is ridiculous.

Mr. Rassner: Let's see if the Doctor thinks it is so speculative and ridiculous.

The Court: I will let him answer if he can. It seems to me it is not only speculative but it is going at it the wrong way. How he can say in certain localities there is a disease from the fact that somebody has it—

Mr. Rassner: I think I can develop it.

The Court: All right.

A. I would like to know where was the ship or what was the contact of the ship before the eighth day or thereabouts—the eleventh day of November.

Q. Perhaps I am anticipating in my questions. Let me withdraw the question. What is the period of incubation of poliomyelitis? A. About two weeks. It varies from about six or seven days to about sixteen or seventeen days.

Q. Suppose you explain what you mean by that? A.

The period of incubation means the time from the introduction of the germ into the body to the time the body responds. That is, if you respond to a person who has got a cold today the average period of incubation for a cold is twenty-four hours. You will get sick if you are going to in twenty-four hours. Similarly, with infantile paralysis, if you are exposed to the germ, from six or seven days anywhere to fifteen days after you are going to come down with the disease if you are going to come down. The most likely period is the middle period. Most of the cases will come down in the middle period.

464 Q. Is it fair to rule out the fact that the virus was brought from the United States? Can you state with a reasonable degree of medical certainty that the virus was not brought from the United States? A. It is likely that the virus of infantile paralysis would not manifest itself in two or three months.

Q. Can you state with a reasonable degree of medical certainty that the virus was introduced aboard this ship at China?

Mr. Gray: That is objected to, because the witness has not been informed that the vessel also called at Port Said, Colombo, and Singapore, after she left 465 New York.

Mr. Rassner: We have shown a period of incubation.

The Court: I will let him answer. You can put those questions to him on cross-examination.

You say that the incubation period is from what?

The Witness: Six or seven days.

The Court: Six to seven days after exposure?

The Witness: That is right, to about sixteen or seventeen as the maximum.

The Court: Sixteen or seventeen? You said fourteen or fifteen, I thought. Sixteen or seventeen.

That is, it could be anywhere from six to seven days to sixteen or seventeen?

The Witness: That is right. With the most likely period being about ten days.

By Mr. Rassner:

Q. Now assuming that Mr. McAllister contracted infantile paralysis towards the latter part of November, 1945, can you state with a reasonable degree of medical certainty that the polio was introduced aboard the vessel from
467 localities within the vicinity of the vessel during the preceding sixteen days?

Mr. Gray: That is objected to because of the statement "contracted the disease." The question when you contract the disease does not show in the evidence and I think the question should include Mr. McAllister's testimony as to the various symptoms and when he experienced them.

Mr. Rassner: I don't think that makes any difference.

The Court: I will let him answer if he can.

468 A. It is reasonably certain that an individual coming down with the disease on a certain day was exposed to the virus from six to seven days to sixteen or seventeen days.

Q. And is it reasonable to assume that the virus was in the vicinity at that time?

Mr. Gray: I object to that.

The Court: I will let him answer. What do you mean by the locality?

Mr. Rassner: Shanghai.

The Court: Haven't got any testimony as to where the vessel was in the first place—

Mr. Rassner: I will withdraw the question.

Q. Assume that the vessel arrived at Shanghai on November 11th, 1945, and that by the end of that month Mr. McAllister was down with the disease of infantile paralysis; can you state with a reasonable degree of medical certainty that the virus which caused the infantile paralysis was introduced aboard the vessel from Shanghai or its vicinity?

Mr. Gray: That is objected to because the witness has already testified.

The Court: I will let him answer if he can.

Mr. Gray: A carrier might have intervened, and 470
that extends the time almost indefinitely.

A. The answer is yes.

Q. Doctor, assuming that Mr. McAllister had a stiff neck, felt as if his entire body with the exception of the right arm had been burned—had that sensation of its having been burned, had a feeling of fear of anybody approaching him or touching him, that if anybody touched him it felt as if the particular part of the body that was being touched was being burned, he felt nauseous, he felt dizzy, he felt weak, had that feeling of apprehension that he couldn't move his jaw, that he couldn't take solid food, that he couldn't get out of bed; would you consider that 471
such conditions indicated the need of calling a physician?

Mr. Gray: That is objected to unless it appears when this occurred and whether there was a physician available.

Mr. Rassner: I don't see that that makes any difference, when or where.

The Court: I will permit it.

A. Did he need a doctor? Yes.

Q. Would you consider it good practice not to have made some effort to get a doctor under those circumstances?

Mr. Gray: That is objected to.

The Court: Objection sustained.

Q. Doctor, assuming that at or about two weeks before the end of 1945, the master, the chief mate and the purser, as well as the chief engineer and the first engineer, had been informed that Mr. McAllister was not feeling well, that by the 20th or 21st day of November, 1945, Mr. McAllister was confined to his bunk with the symptoms which I have just described, can you state what would be reasonable practice by a master of a merchant vessel under those circumstances with reference to anything done or to be done on behalf of Mr. McAllister?

Mr. Gray: That is objected to. It is not within the province of this witness.

The Court: I will let him testify.

Mr. Gray: It is immaterial and irrelevant.

A. Well, the patient was in need of medical care and the best medical care possible would have been in a hospital. He should have been removed to a hospital under expert care at once.

Q. You consider that good practice? A. Yes.

Q. Would you consider the failure to give him such treatment bad practice?

Mr. Gray: That calls for a conclusion.

Mr. Rassner: Of course it is a conclusion. He is here as an expert.

The Court: I will let him answer.

A. Yes, it was bad practice not to take care of the man.

Q. Will you explain your reasons for that? A. Well, they are pretty obvious. A man that is sick can be brought to good health again only by those people who are best able by training and experience to bring him to good health.

475

A diagnosis has to be made. The treatment may be diametrically the opposite depending upon what the diagnosis is. These diagnoses cannot be made in a bunk; they have to be made in a place where there are adequate facilities for laboratory tests. The best place to make those laboratory tests is in a hospital.

Q. Would the fact that there were two hospital ships in the immediate vicinity that were available change your opinion any? A. It depends on what happened? Was he taken to the hospital? Were they contacted?

Q. No, he was left in his bunk. A. It wouldn't change my opinion. He still should go to a hospital.

476

Q. But you say that a doctor should have been called? A. Yes, a doctor should have been called.

Q. Are you familiar with the so-called Kenny treatment? A. Yes, sir.

Q. Will you please tell us what that Kenny treatment is and what Mrs. Kenny claims it consists of? A. In the Kenny treatment for infantile paralysis the patient is treated very vigorously from the very start, hot packs are brought constantly upon the spasmotic muscles, and every attempt is made to relieve the pain and the spasm. Sister Kenny does not believe in putting the affected limb at rest, but insists that the muscles be kept at play all the time. That in general is the treatment.

477

Q. Would you explain how she accounts for the different effects and results of her treatment. A. She maintains that most of the residual paralysis that occurs in infantile paralysis is due to the fact that the antagonistic muscles do not get a chance to quiet down because they are always playing against the spasm, and by her method she feels that she keeps the muscles all at rest and so gives them a chance to heal, and the antagonistic muscles won't be pulled, and therefore there won't be any paralysis.

Q. Does she claim it is an absolute preventative of residual paralysis?

Mr. Gray: That is objected to.
The Court: It is leading.

A. Yes.

Q. Will you state what Sister Kenny claims as to any residual paralysis. A. Sister Kenny claims that with meticulous care and her treatment there is no residual paralysis.

Q. What is the period of spasm? A. About a week to three weeks. It may go on to four.

479 Q. Is there a universal practice as to when treatment should be instituted in a patient suspected of having infantile paralysis? A. It is universally agreed that the earlier you begin treatment the better.

Q. Is it a question of days or is it a question of hours? A. It is a question of hours or even minutes.

Q. And that is usually accepted, that it is even a question of minutes? A. That is right.

Q. That treatment should be instituted at once? A. That is right.

Q. But suppose the condition is not diagnosed but the man has a stiff neck and the symptoms I have described, what would that indicate? A. A suspicion of infantile
480 paralysis.

Q. Is infantile paralysis now a disease commonly known to every doctor? A. Yes.

Q. And are the symptoms very easily recognized? In other words, any doctor can recognize the symptoms? A. I think so.

Q. And even if he didn't recognize them but merely suspected infantile paralysis would that indicate that course of treatment to be instituted immediately? A. I think so, yes.

Q. Now, Doctor, you are familiar with the length of time that it takes to treat the average case of infantile paralysis, are you not? A. Yes, sir.

Q. Now, you did examine Mr. McAllister, did you not? A. Yes, sir.

Q. When did you conduct such an examination? A. Last Thursday or Friday.

Q. What was the nature of your examination and what were your conclusions as to his condition? A. I examined his muscle reflexes to determine the status of the nervous system and muscular system. I tested his ability to walk and use his legs and his ability to stand.

Q. What did you find? A. I found that he is almost completely paralyzed from the waist down.

482 Q. What are the conditions of the muscles? A. The muscles of the legs and of the thighs are wasted.

Q. How about the left arm? A. I have no recollection of the left arm.

Q. How does he get about? A. He gets about by virtue of the fact that the legs are encased in braces and then only by swinging his body with crutches.

Q. Does he have to lock and unlock his leg braces in order to change from a standing to a sitting position? A. Yes, sir.

Q. Is that condition permanent, Doctor? A. The atrophy of the legs?

483 Q. His present condition. A. Yes. To a great extent, yes.

Q. In other words, he was in need of further treatment? A. Yes.

Q. Can you tell us with a reasonable degree of medical certainty the minimum length of time that Mr. McAllister will require in order to obtain the maximum benefit of medical aid and attention? A. He should be under treatment for the next ten years.

Q. And that is your minimum estimate, Doctor? A. Yes, sure.

Q. What is the average? Would you say from ten to what? You gave us the minimum. A. I should say from ten to fifteen years.

Q. In other words, a fair estimate would be from ten to fifteen with a minimum of ten? A. That is right.

Q. Can you tell us what the expense—the reasonable cost of nursing care and treatment would be for Mr. McAllister per year?

Mr. Gray: That is objected to because the witness hasn't been qualified yet. It doesn't appear that he is a practicing physician.

Q. Are you a practicing physician? A. No.

Q. What is your present position? A. At the present time I am Deputy Health Commissioner.

Q. As Deputy Health Commissioner are you familiar with the expenses of various hospital treatments and care? A. Yes.

Q. And are you familiar with how much it would cost, the reasonable expense per year, to take care of a man like Mr. McAllister? A. Yes.

Q. And how much would that be?

Mr. Gray: I still object to it.

The Court: I don't see that it has any bearing on this case.

Mr. Rassner: Maybe I can point it out to your Honor.

The Court: I heard your opening.

Mr. Rassner: We will show that the Marine Hospitals have discharged Mr. McAllister as being unable to do anything for him. He is now under treatment at Bellevue and Bellevue makes a charge. In other words, they bill everybody. I don't say that they insist on being paid, but they bill everybody and if the ship should stand the expense, the City of New York should not be made to pay, or the Association for Infantile Paralysis.

The Court: That raises a serious question, as to whether the Marine Hospitals, which are operated and financed by the taxpayers of the United States, are not the place for him to obtain this treatment.

Mr. Gray: I still say it is immaterial, irrelevant and it doesn't appear that this witness has ever rendered any bills, has ever had any bills rendered to him or—

The Court: You can cross-examine him as to whether he has ever earned a dollar outside of the City of New York. 488

Q. May we have that answer? What is your estimate Doctor? A. About $2,500 to $3,000 a year.

Mr. Rassner: That is all.

Cross Examination by Mr. Gray:

Q. Doctor, have you ever been a practicing physician? A. Yes, sir.

Q. When did you stop practicing? A. 1935.

Q. You haven't been practicing then in twelve years? A. That is right. 489

Q. Was that the time you went into the employ of the City of New York? A. No; that was the time I became a full-time employee of the City of New York.

Q. Prior to this full-time employment you had also been in the employ— A. Part time.

Q. In what capacity were you then employed? A. A Chief of the Division of Epidemiology.

Q. Now, Doctor, is a stiff neck the sole symptom of poliomyelitis? A. It may be.

Q. If a patient came to you with a stiff neck, would you immediately diagnose it as polio? A. I should think I would want to know a little more about the patient.

490 Q. You would want to have a further diagnosis, would you not? A. No; I would want to have further facts—did he have fever, did he have certain other symptoms?

Q. Then the presence of a stiff neck would not be conclusive in your mind? A. The presence of one symptom is never conclusive in medicine.

By the Court:

Q. It would not even be suspicious? A. Oh, yes.

491 Q. I don't want to turn this into a clinic, but I had a stiff neck on my vacation one summer and in two or three weeks it had gone all over my body and that was diagnosed subsequently by a lot of learned doctors, as a shadow somewhere near the sinus and it was cleaned up and I never had it since, and I don't think that one of those doctors had any idea that stiff neck or stiffness in the other joints was anything more than rheumatism.

All right. I didn't mean to inject myself into this clinic. Perhaps the members of the jury would want to get some free advice now that you are employed by the City. A. They get advice from me once in a while your Honor.

492

By Mr. Gray:

Q. Now, Doctor, you were asked whether it would be necessary to have a doctor on board a vessel carrying fifty or more persons. Did you consider in that connection the length of the voyage?

Mr. Rassner: I think we are going far afield, your Honor.

The Court: No, this is cross-examination.

A. As I remember the question, it wasn't phrased exactly the way you put it now. I think the question was phrased,

did I think that a doctor should be on board a boat where there are fifty people. I was very careful—

Q. To say yes? A. I was very careful to answer it the way I thought it was put to me, namely, that any group of individuals is entitled and by right should have the benefit of the best expert advice that they can have.

Q. Then your answer is that a doctor should be on board a vessel where there are fifty people? A. What?

Mr. Gray: Please read the question.

Q. (Question read.) 494

Mr. Rassner: I think we are going far afield. I think your Honor should take judicial notice that a ship is required by law to have a doctor on board the ship.

The Court: We were going to forget about it temporarily.

Q. Well, Doctor, it is not your contention that you should have a doctor on a ferryboat going across the Hudson River, is it? A. I suppose there are some qualifications to the requirement that there should be a doctor when there are a considerable number of people together. 495 I should say we don't need a doctor in this room here. The circumstances vary.

Mr. Rassner: We did need one yesterday.

The Court: We didn't need one yesterday either.

Q. Well, Doctor, let's be frank about it: Do you think a doctor would have been required on a voyage from Shanghai to Tsingtao with fifty people on board that only took about 36 hours? A. Why, I don't think that you can just say it in that way. How is the boat going? Is it keeping on going all the time?

Q. Yes, it is keeping on going all the time. A. I think a boat with fifty people on it ought to have a doctor on it all the time if it is going from place to place.

Q. Under all conditions? A. Yes.

Q. Is it your opinion, Doctor, that this method of disposing of sewage on board the Haines with a trough and a stream of water running through it, is an improper way of handling it? A. Oh, yes.

Q. Don't you know that is exactly the same way they use on all the warships in the American Navy? A. It is
497 still reprehensible if that is the way. If there isn't a method whereby all sewage is completely destroyed so there is no chance that any part of it can come in contact with a human being—

The Court: How about your own city? Do they do it that way in New York City?

The Witness: We have a closed system. No sewage can ever come in contact with any human being unless they violate the instructions of the City government, that is, unless they bathe at the outlet of a sewer.

The Court: The sewage runs right into the
498 rivers.

The Witness: That is right, but you are forbidden to use the rivers for any purpose that will bring the river into contact with you.

Q. You don't mean to say that is a complete disposal of the sewage? A. In New York City it is treated besides. I didn't want to go into that.

Q. Do you mean to say that that is a complete disposal and elimination of sewage? A. In New York City?

Q. Yes. A. Yes.

Q. Then why do they forbid people from bathing at the outlets? A. Within those limitations it is a complete

disposal of the sewage. You don't want to go into an argument about how we are disposing of sewage. That is a subject in itself. There is a difference between that and letting sewage get washed off on a trough with all the inherent circumstances that might occur, that a big hunk of bowel movement might go off on the passageway and go down the stairs and be washed around and trampled on by feet.

Q. Has anybody suggested such a thing like that in this case? A. No.

Q. Why do you talk about it? A. Those are possibilities on a ship. 500

Q. Is that what your testimony is based upon? A. That might be one of the things it is based upon.

Q. Isn't it one of the things? A. It is one of the things, yes.

Q. Now, Doctor, you have spoken about infection being carried by so-called carriers? A. That is right.

Q. How long in your experience and in your studies have you found that such virus is communicable from a carrier? A. A carrier of what? It depends upon what disease.

Q. Of the virus. A. What virus? 501

Q. Polio. That is what we are talking about. A. There have been no experiments in which an individual, a human being, has been infected artificially by a carrier, so that there is no way in which we know how long the virus of infantile paralysis can be carried.

Q. So then when your told Mr. Rassner that because Mr. McAllister had contracted the disease in the latter part of November of 1945, that there just have been polio in and around Shanghai, you didn't consider the length of time that a carrier might have been infected with it?

Mr. Rassner: Now if the Court please, my question was, with a reasonable degree of medical

502 certainty, and I am not required to prove it by scientific accuracy. There is quite a distinction in the burden which the law imposes upon a plaintiff to establish his caus of action, and I think it is eminently fair.

The Court: You are not summing up this case yet.

Mr. Rassner: I object to the question on the ground that it is eminently unfair.

The Court: Why not let him ask the question and go back after and argue that.

503 The Witness: May I have the question?

Mr. Rassner: Before that, may I press a further objection on the ground that we do not have to prove our case insofar as the medical proof goes by scientific accuracy but merely by reasonable opinion based on medical knowledge and not scientific accuracy, and Mr. Gray is delving into scientific accuracy. I object to the question.

The Court: Overruled.

Q. (Question read.) A. I don't quite understand the question, but the answer—

504 Q. If you don't understand it, don't try to answer. A. I would rather have it over again. Let's see.

Q. You say that carriers—that the disease is communicable from a carrier who is healthy? A. That is right.

Q. And you don't know how long a healthy carrier is in a position to infect a victim? A. That is right.

Q. How can you say then that there was polio in and about Shanghai when you do not know whether Mr. McAllister had come in contact with the carrier who had the virus? A. Well, infantile paralysis is peculiar in the fact that cases of it do not arise de novo, that is, out of themselves, and if we have a case of infantile paralysis almost invariably within the region of human contact there will

have been—within two weeks there will have been another case.

Q. You mean that Mr. McAllister would have communicated it to someone else within two weeks? A. I was going the other way. The fact that Mr. McAllister had it is pretty good evidence that in and around that neighborhood up to about two or three weeks before there was another case.

Q. What do you mean? By eliminating the possibility of a carrier? A. Well, the answer—

Mr. Rassner: I think that has been answered. 506

Mr. Gray: I think it has not been answered to my satisfaction.

Mr. Rassner: I submit it has been answered.

The Court: Let him answer it.

A. I will answer the question point blank. If there is a case of infantile paralysis there must necessarily according to the best of our knowledge, have been another case three weeks—a maximum of three weeks before in and around the environs or the friends of the first case.

The Court: The fringe?

The Witness: Friends of the first case, indi- 507
viduals who came in contact.

Q. By contact you mean not their physical contact? A. Yes, but physical contact in a very broad sense.

Q. Like what? A. People who come within two feet of him.

Q. Then is it your testimony or your opinion that Mr. McAllister was exposed to a carrier or to someone who had the disease within three weeks of the time that he had the first onset? A. Yes.

Q. And the person with whom he came in contact might have been a carrier who was healthy himself? A. Yes.

Q. And this man, the carrier, must have had some contact with either another carrier or a person who was actually ill within three weeks prior to that? A. Yes. You are stating the maximum. It can be back ten days or two weeks but the maximum is three weeks.

Q. So the carrier, assuming he got the virus from a carrier, the carrier might have picked it up in Hong Kong? It is possible, isn't it? A. Sure it is possible.

Q. Now when you diagnose—by the way, have you ever diagnosed a case of polio yourself? A. Yes. During that fifteen years that I was doing part time work for the Health Department, I was known as a diagnostician and that was my job, to go out on doubtful cases of polio and tell the doctors what the case was.

Q. What was your batting average on that? A. It was pretty near one hundred per cent. A good man knows the stuff.

Q. Will you tell the jury what you look for when you diagnose a case of polio? What is the first step? A. Fever. You take the temperature, and if there is temperature, that is a fairly good sign in an epidemic of infantile paralysis, there is more than a suspicion that this may be a case.

Q. Let's leave out the epidemic because that doesn't appear here.

Mr. Rassner: I object to that comment. It does appear here. The captain so said.

Mr. Gray: The captain said so?

Mr. Rassner: That is the testimony, that the captain did say it. I object to Mr. Gray's statement as not being a correct statement of the testimony.

Mr. Gray: I make a similar objection to Mr. Rassner's statement.

The Court: Objection overruled.

Q. Now, Doctor, let's eliminate any question of a rampant epidemic of polio in a locality. Supposing you go to a patient who complains of a fever. Now just because he has a fever doesn't mean he has polio, does it? A. No.

Q. He can have a cold and have fever? A. Not according to medical science. A cold is characterized by no fever. He could have other diseases, yes.

Q. You can also have a fever when you have a cold? A. I say no.

Q. I have had them. A. That happens to be a difference in terms.

512

Mr. Rassner: I think that Mr. Gray is trying to testify.

The Court: We will take a recess for a few minutes.

(Short recess.)

Q. Doctor, I think we got the point where you have a patient with a fever that we both agree is a fever. Now what is the next step you would take to try and diagnose this case as a polio case? A. Well, you examine for evidence of irritation or infection of the central nervous system. One of the signs is a stiff neck. Another sign is the changes of certain reflexes of the body. Another sign is evidence of paralysis or weakness in certain of the muscles of the body.

513

Q. If you had a man with a fever and a stiff neck and no evidence of an epidemic of paralysis, would you make a diagnosis of polio? A. There are various diseases of the central nervous system, all of them requiring expert diagnostic ability.

Q. Will you please describe the central nervous system? A. The central nervous system is the brain and the spinal cord.

Q. And the trunks leading from the spinal cord? A.

No, that is not the central nervous system; that is the peripheral nervous system.

Q. What is the combination of symptoms which is accurately indicative of a case of polio?

Mr. Rassner: If the Court please, I think we are going far afield. We are not concerned with whether or not this condition was diagnosed as polio or anything else. The man was sick, lying in bed, and he should have been sent to a hospital. That is plain. They knew the man was in bed and that
515 he needed hospitalization. And that is our claim. That is our case. I object to this as being incompetent and irrelevant.

The Court: Overruled.

Q. (Question read.) A. Well, fever and stiff neck may be enough to make a diagnosis of polio. There are certain laboratory tests that should be done immediately upon—

Q. What are they? A. Lumbar puncture and an examination of spinal fluid.

Q. What would be found in the spinal fluid which would indicate the presence of polio? A. Increase of the white
516 blood cells.

Q. Over the normal? A. Yes.

Q. There are white blood cells always in the— A. Not necessarily from two to three.

Q. Per cubic centimeter? A. That is right.

Q. What other laboratory tests are there? A. There is no other that is available in infantile paralysis.

Q. Then we have a spinal puncture, the existence of fever, a stiff neck, and paralysis somewhere? A. No, no. You don't need paralysis to make a diagnosis of polio.

Q. A stiff neck? A. And fever.

Q. And your spinal puncture? A. A lumbar puncture can be negative but you should do the lumbar puncture.

Q. If the lumbar puncture is negative does that elimi-

nate polio? A. It can still be polio. It just being that it is very early.

Q. It is very early? A. Or that the disease has not gone further than that.

Q. Than what? A. Than a mild irritation of the spinal canal; the disease might stop there and get better, or stop temporarily for several days and then get better or worse.

Q. Then the existence of the stiff neck and fever are indicative of polio? A. Certainly very very strongly suspicious.

Q. I am trying to get suspicious out of it. A. You 518
can't make a diagnosis like that in medicine. That isn't medicine. You can't make a diagnosis on one or two symptoms.

Q. How do you know when you have got polio if two symptoms are not enough to tell you? A. There are a whole lot of other things in medicine you have to take into consideration. You have to take into consideration what the other thing may be, and every prudent man in medicine doesn't take any chance and treat it as the most dangerous, the thing that can cause the most trouble until more signs and symptoms present themselves.

Q. Then after you get your stiff neck and your fever, 519
would you take more than one spinal puncture if the first one was negative? A. It depends upon the individual case. That is highly personal. You are asking me to diagnose a hypothetical case of polio and saying if two things are there it is not polio and if three things are there it is polio. That isn't the way I diagnose. In medicine each case is a law unto itself.

Q. If you see a case where there is fever and stiff neck— A. If you don't think it is polio you are not a good doctor.

Q. That is a pretty good indication? A. That is a pretty good indication that it is probably polio.

Q. And it couldn't be anything else? A. Oh, yes, it could be tetanus, it could be meningitis, it could be half a

dozen other things, but all of them are very, very important and require medical attention.

Q. Supposing you have fever and a stiff neck, and gave the patient a Sister Kenny treatment immediately when as a matter of fact the man had tetanus, would that be good medical practice?

Mr. Rassner: I object to that.

The Court: I will let him answer.

Mr. Rassner: Aren't we going into fields of speculation, your Honor?

The Court: All right, I will let him answer. You can fire at him when you are ready.

A. The next thing after you have the patient with fever and stiff neck, is to have the patient removed to a hospital where you can rule out with the best means at your command other diseases.

Q. How would you rule out other diseases? A. Specifically, if it were meningitis, the spinal fluid would indicate the presence of organism, and there would be a large increase in the white blood cells.

Q. Then you need a spinal puncture to be sure? A. I beg your pardon?

Q. Wouldn't you need a spinal puncture to be sure?

Mr. Rassner: To be sure of what?

The Court: To be sure whether he had meningitis or tetanus or polio.

Mr. Rassner: Your Honor sees the purpose of my objection?

The Court: No, I dont.

Mr. Rassner: We are going into other fields.

The Court: We can all learn from these doctors.

Mr. Rassner: Irrespective of what the disease was, our position is—

The Court: I would rather have him explain it than I would have you.

Mr. Rassner: I am trying to explain our position. I couldn't explain the medical part if I wanted to.

The Court: I am not going to display my ignorance.

Mr. Rassner: I am not trying to display mine, either.

The Court: I am going to keep very quiet.

Mr. Rassner: Your Honor, I object to Mr. Gray going into every field of medicine. 524

The Court: He is not going into every field of medicine. Not as long as we are—

The Witness: What are the next steps?

Q. Will you please answer the question? A. What is the question.

Q. Would you need a spinal puncture then to be sure whether the patient had meningitis or tetanus or polio? A. You might need a spinal puncture, yes.

Q. When you became an expert in epidemiology, what did you do to qualify? A. I went to school, the School of Public Health, and got a degree. 525

Q. Where was that? A. Columbia.

Q. What was your course? A. Half-time two years.

Q. How many hours semester? A. Forty points, something like that.

Q. Forty points? A. It was a regular course in public health.

Q. Did you get a degree from Columbia? A. Yes.

Q. What have you done since then to keep yourself up to date? A. I probably read as much as there has ever been written on epidemiology.

Q. That doesn't tell me a thing. A. I have read everything that has ever been written to my knowledge.

Q. Do you know Dr. Philip M. Stimson's book? A. Yes.

Q. Is Dr. Stimson an authority on epidemiology? A. Yes, sure, on the epidemiology of the communicable diseases.

Q. Are you an expert on special communicable diseases? A. I think my experience has been broader. I have seen a lot more different kinds of diseases than Dr. Stimson has described in his book.

Q. Than he has described in his book? A. Yes.

Q. His book is limited— A. It is limited to the common contagious diseases. That is the name of the book.

Q. You are not saying that Dr. Stimson's experience is not as broad as yours?

Mr. Rassner: Oh, I object to that. That is an embarrassing question. Ask me, I will tell you.

Mr. Gray: He worked himself into that.

The Witness: I will answer the question.

Mr. Rassner: I happen to know your modesty. The question is eminently unfair.

The Court: Overruled. He is not as sensitive as you are.

Mr. Rassner: I know that, but he is more modest than I am.

The Court: I don't dispute that either.

Mr. Rassner: I will concede that and I object to this doctor being asked to make a comparison between Dr. Philip Stimson and himself.

Mr. Gray: He started it himself.

Mr. Rassner: May I have a ruling?

The Court: I have already ruled. I don't know why you want a—

Q. Do you know Dr. Robert Ward of Bellevue Hospital? A. Yes.

Q. Is he an authority on the epidemiology of polio? A. I think I will have to ask the Court's indulgence. I don't think it is quite fair for me to answer questions about what I think of another physician.

Q. You know his reputation?

The Court: He has got some book he wants to show that he has written. I will sustain the objection to the question—the doctor's objection.

Q. Do you know Dr. Robert Ward? A. Yes, I know him personally. 530

Q. Do you know his reputation as an epidemiologist on polio? A. I would prefer not to answer that question.

Q. What works have you read on epidemiology on polio? A. Well, there is a book by Stallybras called Principles of Epidemiology. That is probably the standard on epidemiology and includes polio. The National Foundation for Infantile Paralysis has a book on the epidemiology of polio.

Q. Do you know its title? A. I think it is just a reference book of all the titles in polio. Lewyn has written a book. Josephine Neal, who used to be connected with the Health Department, wrote a great many articles on polio. Appelbaum, who is connected with the Health Department, 531 has written many articles on polio. Stimson has written some articles on polio. There are several recent publications by the Yale Schools—John R. Paul and Trask, who is also connected with Yale, who recently died. There is a lot of old work that has been written on infantile paralysis.

Q. And you have read all of those? A. I have read the majority of them. I am pretty well up on polio.

Q. I am trying to find out if you are pretty well up. Have you read all of those books yourself? A. The ones I have just mentioned, yes. I have probably read everything there is written on polio. I might as well put it

bluntly—because I am interested in polio for some years.

Q. Let's get to the question of carriers. Is it not possible for a person to be a carrier and be immune from the disease until some element of his resistance breaks down and then he becomes a victim? A. That is a theory. Nobody knows how true it is. That is a well defined theory of how infantile paralysis is spread. There is no proof as to how infantile paralysis is spread. All we know is, we have different theories and different epidemiologists have a few ways of explaining the few facts we have.

533 Q. So it is a guess? A. It is not at all a guess. It is the measured expressed opinions of thinkers who have read all the books and have discussed all this subject for years and years. It is the best distillation of their brains. It is by no means a guess.

Q. It is all opinion? A. It is not opinion. It is opinion only in the sense that it is the measured result of a man's thinking, his opinion.

Q. But no one knows yet the source? A. No one knows the way in which infantile paralysis actually does travel from one individual to another.

Q. And no one knows how long an infantile paralysis virus can be harbored by an individual before you have an

534 onset of symptoms? A. In that individual? We don't even know that that individual ever gets the disease.

Q. And you don't know how long a carrier can be a menace to people who are susceptible to the disease? A. No. All we know is it can be six or eight months. How much longer we don't know.

Q. It is possible, is it not, that Mr. McAllister got the contact when he was ashore in Hong Kong or Shanghai and then the disease developed later on?

Mr. Rassner: I object to that.

Mr. Gray: Don't interfere.

Mr. Rassner: If Mr. Gray is usurping the part of the Court, I will take my rulings from him.

The Court: I will leave him alone and let him take care of himself. He is quite able to and doesn't need your protection, nor does he need mine. I am sure he will—

Mr. Rassner: However, I am perfectly willing to get the rulings from Mr. Gray when he is appointed by the President.

The Court: I will let Mr. Gray ask his questions.

Mr. Rassner: In the meantime I am entitled to make my objection without Mr. Gray telling me to sit down, and I haven't even made my objection. 536

The Court: I have indicated that I am going to overrule your objection. If you want to make it to have a record, I am quite willing.

Mr. Rassner: No.

Mr. Gray: Now will you read the question.

Q. (Question read.)

Mr. Rassner: Now if the Court please, I think my objection is well taken. What is possible is not good cross examination and there is no proof of his going ashore other than going ashore at Shanghai. 537

The Court: I will let him answer the question.

A. Is it possible?

The Court: Do you have the dates, or do you want the dates when he was at Hong Kong, when he was at Port Said, or any other place?

Mr. Rassner: There is no testimony he ever went ashore at Hong Kong.

Mr. Gray: We haven't finished examining.

The Court: I don't know whether he went ashore.

Mr. Rassner: And the form of the question—is it possible? That is not good form.

538 *Samuel Frant—Cross.*

The Court: That is not the criterion in this court. If I attempted to pass on objections on any such basis as that, I would be sustaining every objection and we would never get through.

A. I should say that everything is possible in medicine. It is rather unlikely that he became infected more than two weeks before he actually got sick.

Q. You mean his contact was not more than two weeks before he showed the first symptoms? A. His contact with the virus that finally got him sick.

539 Q. Could it have been two weeks before? A. Up to two weeks.

Q. Before he got the first symptoms? A. Yes.

Q. And the first symptoms probably would be fever? A. Yes, fever.

Q. Now if these coolies and the passengers that have been described to you so minutely by Mr. Rassner, were all healthy people—

Mr. Rassner: I object to the characterization. I would like to be left out of it.

Mr. Gray: If it wasn't minutely it was a guilty conscience.

540 Mr. Rassner: I could do a good deal more than that if I wanted to become minute about it. Objection to the form of the question.

The Court: Sustained.

Q. Now, Doctor, if these coolies and passengers who came on board the vessel as described to you by Mr. Rassner, were all healthy persons, there would be no danger to anybody on board the vessel of acquiring the disease? A. I would like to know what you mean by "healthy persons."

Q. What do you mean by a healthy person? A. I mean a person who is not sick or is not a carrier of disease.

Q. That is what I mean. A. If you were asking me the question and you wanted an answer as to whether they had infectious diseases such as infantile paralysis—you want to know whether they were healthy?

Q. It would be impossible to know? A. It would not be impossible; it would be unlikely that you could do the things you would want to do.

Q. Examine them? A. You would have to do laboratory tests with animals.

Q. You would have to do a spinal puncture? A. No, not a spinal puncture. 542

In other words, you would have to perform some laboratory tests with animals before you—you wanted them healthy.

Q. Let's stop sparring and get down to the testimony.

Mr. Rassner: I think that is a good suggestion.

Mr. Gray: The witness is always the "guy" that spars.

Q. Doctor, you have stated in effect that because people came on board and used the toilet facilities it was dangerous for the people who remained on board who also used the same facilities, didn't you? A. I don't remember saying that. 543

Q. Then that isn't true? A. I don't remember that it is true.

Q. Let's find out now. Is it true? A. What?

Q. What I just asked you.

The Witness: Will you read that, please? (Record read.)

Mr. Rassner: Now the Doctor said he didn't remember saying that.

Q. The next question is, it would not be dangerous for them to come on board? A. I think I have to know a whole lot more about what is going on. You are asking a

question out of the air about people coming aboard a boat and using its toilet facilities.

Q. Assuming all the assumptions in the question given to you by Mr. Rassner, and upon which you answered questions. Now will you please state whether the fact—whether there was any danger to the people in the crew of the steamship if healthy people came on board the vessel to use the toilet facilities?

Mr. Rassner: Objected to.

The Court: He has already answered.

545 Mr. Gray: No, he has sparred on it.

Mr. Rassner: I don't think so. I object to the characterization.

The Court: I will permit him to answer if he cares to.

A. You want to know if there is a danger to a crew of a vessel when people from ashore come aboard and use the toilets, and these people use the toilets too?

Q. If they are healthy. A. And I have raised the other point. You have got to define what you mean by "healthy".

546 Q. We have already defined it in your own words. A. They are either not sick or not carriers.

Q. When such people come aboard is there any danger to the crew? A. No.

(Mr. Rassner stands up.)

The Court: He has already said no.

Mr. Gray: He is waiting for an objection, waiting for him to help him out.

Mr. Rassner: Now he is reading the Doctor's mind.

The Court: He has already said no. We are beyond that.

Mr. Gray: That is all. Thank you.

Mr. Rassner: Just two questions.

547

Redirect Examination by Mr. Rassner:

Q. Doctor, by "healthy," if you understand Mr. Gray's question, that is people who don't carry the virus with them, is that right? A. That is right.

Q. As to your experience, did you take charge of any department during the 1931 epidemic of infantile paralysis in the City of New York? A. Yes, I was in charge of the Health Department's activities, which were the main activities in the city.

Q. And that was over four thousand cases that year? A. That is right.

548

Q. And you were in complete charge of that? A. Yes, that is right.

Q. And who was in charge of every epidemic since?

Mr. Gray: Of what?

Mr. Rassner: Of every epidemic in the City of New York.

A. I was.

Q. And there have been several since? I don't think we have had one as bad since 1931? A. No.

Recross Examination by Mr. Gray:

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Q. Yours is a desk job? A. By no means.

Q. You go out into the field and make a diagnosis yourself? A. I have.

Q. When is the last diagnosis you made? A. Of Polio?

Q. That is right. A. Five, six years ago.

Mr. Gray: That is all.

Mr. Rassner: That is all. Thank you, Doctor.

Mr. Rassner: Shall we recall Mr. McAllister?

The Court: We have got some time left, unless the jury wants to adjourn until ten-thirty. It is now four o'clock. Suppose we go on for fifteen minutes longer.

ROBERT A. MCALLISTER, resumed the stand.

Direct Examination Continued by Mr. Rassner:

Mr. Rassner: I would like to advise the Court that we are going to try to save some time by offering certain records into evidence by consent. Probably save a lot of time.

Mr. Gray: That is all right.

Mr. Rassner: I offer in evidence the hospital records of the Staten Island Marine Hospital.

Mr. Gray: No objection.

(Marked Plaintiff's Exhibit 7.)

Q. Mr. McAllister, do you know of your own knowledge whether or not there were any other cases of infantile paralysis at the Shanghai Hospital when you were there? A. Yes.

Mr. Gray: That is objected to.

The Court: If there were any what?

Mr. Rassner: Any other cases of infantile paralysis when he was there.

Mr. Gray: You mean on the Repose?

Mr. Rassner: On the Repose.

The Court: At what hospital?

Mr. Rassner: On the hospital ship Repose.

Mr. Gray: That is objected to as immaterial because this was after this witness had contracted the disease.

The Court: Objection sustained.

Q. Do your know of any other cases of infantile paralysis at any place in and about the Shanghai harbor during the time that you were sick?

Mr. Gray: That is objected to as the witness isn't qualified to diagnose a case.

The Court: You mean prior to November 24th?

Mr. Rassner: No, at about the time—I would say between November 24th and the time he had left the Repose.

The Court: Well, there were none on board this particular ship, were there? 554

Mr. Rassner: I don't know.

The Court: Confine it to the ship or I will permit him to answer that as to the rest of it if he knows.

Mr. Rassner: All I am asking now is whether there were any on the Repose.

The Court: He didn't get to the Repose until some time after December 11th. I don't think that would be competent. Besides you couldn't tell where they came from. They might have come from the Philippines.

Mr. Rassner: Yes; perhaps it would be a bit speculative. I won't press it. 555

Q. What was your salary aboard the ship? A. When I was taken off my salary was approximately $220 a month.

Q. Were you getting any overtime? A. Yes, I was first receiving overtime for night watches.

Q. What did that average? A. That averaged approximately—the night watches of fifteen hours, you got approximately $1.25 an hour.

Q. Mr. McAllister, would you help us out a bit by translating that into terms of months? How much overtime per month did you average? A. A ship like that I

could average approximately a hundred dollars a month. That would be $125 base pay.

Mr. Gray: That is $220 base pay.

Q. $220 base pay and about $100 a month? A. That is right.

Q. One hundred and what? A. Approximately a hundred dollars.

Q. That would be about $320 was your earnings per month while your were with the ship in transit? A. That is right.

Q. While you were on shore, what were your expenses for maintenance? A. While in the United States?

Q. Yes. A. Approximately $50 a week.

Mr. Gray: You mean after he was sick?

Mr. Rassner: No, I mean before he was sick.

Mr. Gray: I object to it as immaterial and irrelevant.

The Witness: You mean before I was sick?

Mr. Rassner: No. You have answered my question.

Mr. Gray: I move to strike out the answer.

The Court: What did the Cosmopolitan allow you for board and lodging, to live? You say $50 a week?

Mr. Rassner: Between voyages.

The Witness: Yes, between voyages.

Q. Yes, when you were ashore. A. It was approximately $50 a week that you needed to live.

Q. All right. When you were on the Repose, did you come in contact with any polio victims that had come from Shanghai?

Mr. Gray: That is objected to as calling—

The Court: Objection sustained.

Mr. Rassner: Very well. That is all.

559

Mr. Gray: If the Court please, I would like to start my cross examination fresh in the morning. We have only a few minutes to go.

The Court: All right. Tomorrow at half past ten.

(Adjourned until February 4, 1948, at 10:30 a. m.)

New York, February 4, 1948,
10:30 o'clock a. m.

560

Trial Resumed.

Mr. Rassner: Mr. McAllister.

ROBERT A. MCALLISTER, resumed.

Mr. Gray: Any more questions, Mr. Rassner?
Mr. Rassner: That is all.

Cross Examination by Mr. Gray:

561

Q. Mr. McAllister, you say you are 27? A. That is correct, sir.

Q. When was your birthday? A. July 16, 1920.

The Court: July 16th.
The Witness: 1920, your Honor.

Q. You say you are married? A. That is correct, sir.

Q. When were you married? A. June of 1945.

Q. In June of 1945? A. That is correct.

Q. When you were on the Edward B. Haines you held a commission, did you not, from the American Government? A. From the Maritime Service, yes.

Q. From the Maritime Service? A. Yes.

Q. What was your rank? A. Lieutenant, j.g.

Q. And you received orders, governmental orders in that capacity, did you not? A. Not after—not after I was sent from the Maritime Service. I never received any direct Government orders.

Q. I did not understand you. A. After I left the Maritime School up in Fort Trumbull I never received any direct Government orders after that.

Q. You did not. Didn't you receive Government orders sent you in the Marine Hospital at San Francisco? A. That I personally received them?

Q. Yes, and before you answer that let me refresh your recollection— A. Certainly.

Q. —that Exhibit 5, if you will look this over, you may refresh your recollection (handing to witness). A. Thank you. (After examining) Yes, I recall this.

Q. You did receive orders? A. Yes.

Q You received orders on December 31, 1945, didn't you, from the medical officer in charge of the U. S. Fleet Hospital 103? A. (After examining) You see, I don't know if I actually received it. I saw this copy, I remember seeing it.

Q. These were the orders under which you traveled, weren't they? A. Oh, yes, yes, they must have been.

Q. Haven't you got an order from that service dated December 31, 1945?

Mr. Rassner: That is objected to.

The Court: Overruled.

Mr. Rassner: Improper cross examination, your Honor. The exhibit is here. It speaks for itself, and Mr. Gray—I do not like to interrupt, but he is asking for conclusions right down the line. I object to it.

The Court: He may look at that and see whether

he may receive it or not. That will tell the story, if it does.

Q. Maybe I can help you. A. All right. What is it you wish to know, Mr. Gray?

Q. This, right here—

Mr. Gray: With the Court's permission I will read to the jury one of the attachments of Plaintiff's Exhibit No. 5:

"U. S. Fleet Hospital No. 103, care of Post Office, San Francisco, California, 31 December, 1945; from 566
the medical officer in command to Lieutenant j.g. Robert A. McAllister, Merchant Marine, No. 440302433.

"Reference (a) Navmed form G.

"1. Upon receipt of these orders you will regard yourself detached from your present duties and will proceed, via Government transportation furnished you, to a port in the United States where upon arrival you will further proceed to the nearest U. S. Naval Hospital, reporting to the Medical Officer in Command thereof for further treatment and disposition. 567

"2. Delivered and detached this date.

Signed "Jas. D. Rives, A. W. Penrod
by direction,"

and then is the endorsement, "U. S. S. Dawson (APA-79) care of F. P. O., San Francisco, Cal. 17 January 1946, from Commanding Officer to Lieutenant j. g. Robert A. McAllister, Merchant Marine, No. 440,302,433.

"1. You reported aboard for transportation at 1040, 31 December, 1945.

"2. Transportation effected, detached at 1,000."

568 *Robert A. McAllister—Cross.*

Q. That is times, isn't it? A. Yes, I imagine so.

Q. That is 10 o'clock in the morning? A. That is correct.

Mr. Gray (Continuing): "17 January, 1946, Richard S. Cass, signed D. G. Howell, by direction."

Q. Does that refresh your recollection as to the time you arrived at the Marine Hospital in San Francisco? A. I did not hear the date mentioned at the time I landed in the Marine Hospital.

569 Q. This is the 17 January 1946. A. That is correct.

Q. Now is your recollection fairly clear about the occurrences in connection with your illness? A. Fairly clear, Mr. Gray.

Q. Your mind has not been affected by this illness at all, has it? A. I hope not. I never heard any statements to the contrary.

Q. As a matter of fact, it isn't, but I just want to make sure you realize it. Your recollection is clear, is it not? A. Fairly clear, within reasonable limits.

Q. And you can make mistakes as to dates, too, can you not? A. Anybody can make mistakes.

570 Q. Like any normal individual? A. Certainly.

Q. As I recollect your testimony, the first onset of this trouble, this disease, occurred—no, strike that out.

As I recollect your testimony the last time that you stated you were ashore was from two and one-half to three weeks prior to December 1, 1945? A. To December 1?

Q. To December 1st. A. December 1st, 1945? Yes, that is correct.

The Court: Two and one-half weeks?

The Witness: Two and a half to three weeks.

The Court: What?

Mr. Gray: I think he said two and a half to three, as my notes show.

Q. My notes show that you stopped going ashore two and a half to three weeks before you left the vessel, is that correct? A. That is correct, Mr. Gray.

The Court: I don't find that in my notes, but still. It is rather confused.

Q. Then during that two and a half to three weeks, that would bring it back to about the 8th of November, wouldn't it? A. That is correct.

Q. Do you remember the occasion of your last going ashore at Shanghai? Do you remember what you went 572
ashore for? A. At Shanghai, the last time I went ashore I believe I took a walk with some—I took a walk. The ship was on the other side of the wharf. So far as I know, I went with an Army lieutenant. We went for a walk when we got to Shanghai at that particular time.

Q. Did you have a buddy on board the Haines? A. Yes, sir, I did.

Q. Who was he? A. He was a first lieutenant, United States Army.

Q. Well, had he been with the ship all the time? A. Up to that time, yes.

Q. From the time she left New York? A. Yes, sir.

Q. You were a buddy of Mr. Bullis, were you? A. I 573
wasn't close to him, if that is what you mean.

Q. I beg your pardon? A. I wasn't close to him, if that is what you mean.

Q. Ordinarily a man doesn't go around by himself on board ship. You usually have a friend on board any ship, that you talk to and play cards with? A. Oh, I played cards with other people, I mean so far as that goes. He doesn't have to be a buddy.

Q. Your buddy was this first lieutenant? A. That is correct.

Q. What is his name? A. I believe his name was William Cook.

574 *Robert A. McAllister—Cross.*

Q. And you and he went ashore about the 8th of November to talk a walk along the piers? A. Oh, no, not at that date—not that I recall that date. This was before the ship left Shanghai that we went for a walk.

Q. How long before the ship left Shanghai did you go for a walk this last time you went ashore? A. It is possibly a day or two before that run to Hong Kong.

Q. A day or two before you went to Hong Kong? A. That is correct.

575 The Court: Perhaps you could summarize for the jury these dates. As I looked through my notes last night I couldn't make much out of them as to when the vessel left New York, when it arrived at Singapore, when it left Singapore, when it arrived at Hong Kong, when it left Hong Kong, when it arrived at Tsing Tao, and when it left Tsing Tao.

Mr. Gray: Suppose I clear that up right now, your Honor.

The Court: Perhaps you can. It must all be in the logbook, and I think there was testimony regarding some of it.

Mr. Gray: Mr. Rassner, will you concede that
576 this is a schedule of the vessel, that she left New York on July 31, 1945—

Mr. Rassner: Will you bear with me just a moment? (Examining papers.) Go ahead.

Mr. Gray: She arrived at Port Said—

The Court: Wait a second. We have July 31st.

Mr. Gray: Departure from New York, July 31, 1945. Arrived Port Said, August 19, 1945. Departure from Port Said August 21, 1945.

Arrived at Colombo Ceylon, September 3, 1945. Departure from Colombo, September 4, 1945.

Arrived Singapore, September 13, 1945.

Mr. Rassner: You are skipping Swettenham, aren't you, in the Malay States?

Mr. Gray: I did not know that she called there.

Mr. Rassner: September 12, arrived at Swettenham, Malay States and departed the same day.

Go ahead.

Mr. Gray: She arrived at Singapore on September 13, 1945. Departed Singapore the next day, September 14, 1945.

Arrived Hong Kong, September 19, 1945.

Mr. Rassner: Well, I think it was the next day. I think it was September 20th.

Mr. Gray: Well, the log will show that.

578

Mr. Rassner: It doesn't make any difference.

The Court: Subject to correction, September 19, 1945.

Mr. Gray: Departure from Hong Kong, September 23, 1945.

Arrived Shanghai, September 26, 1945.

Mr. Rassner: November 1st, if that will be of any aid to you.

Mr. Gray: Departure from Shanghai, November 1, 1945.

Arrived Hong Kong, November 5, 1945.

The Court: Arrived Hong Kong—you had been there.

579

Mr. Gray: She went back again.

The Court: Arrived Hong Kong; that is the second time.

Mr. Gray: Arrived there on November 5th of 1945. Then left Hong Kong again on November 7, 1945.

Arrived in Shanghai on November 11, 1945. Left Shanghai for Tsingtao on November 23, 1945.

Arrived at Tsingtao on November 25, 1945. She docked on the 28th, 1945.

Mr. Rassner: Well now, just one moment about that docking. I will concede up to November 25th,

that is, up to November 25th she arrived at anchorage at Tsingtao, China, and that sea watches were broken on that day.

Q. Will you please look at the logbook—

The Court: That was the testimony, that on the 28th she came to the dock; before that she had been anchored somewhere in the harbor.

Mr. Rassner: That is right. She shifted from anchorage to the dock on November 25th.

581 The Court: And she left when?

Mr. Rassner: At 1 o'clock.

The Court: She left Tsingtao.

Mr. Rassner: Now I have stipulated to that, Mr. Gray, so I see no point in going through the log.

Mr. Gray: Well, I do. (Examining.)

Q. Will you please look at the log, Mr. McAllister, and tell us what time of day the Haines docked at Tsingtao.

Mr. Rassner: That is objected to, your Honor. This is improper cross-examination. The log speaks for itself.

582 The Court: I will let him testify. While we are on it we might as well get through with it.

Mr. Rassner: Let us get through with the bookwork by stipulation. I see no point to this.

The Court: While we are on this we might as well clear this point up, and then it won't have to come up again.

Mr. Rassner: But I do not see why the witness should be burdened with it.

The Court: Don't let us argue about it.

A. Do you want me to read it all?

Q. No. Just tell us what time of day she docked. A. By this log here it says "docked"——

The Court: 8:30, wasn't it?

The Witness: I believe it is later. 11:01.

Q. A. M. or P. M.? A. A. M.

Q. All right. It is probably a. m. because——

Q. Yes, it must be 11:01 a. m.

You did not arrive in Shanghai until November 11, 1945, so that when you went ashore with Lieutenant Cook, it must have been not before the 11th of November, isn't that so? A. It was before the 11th of November. It was before we left for Hong Kong.

584

Q. Oh, after you came back to Shanghai from Hong Kong you did not go ashore? A. That is right.

Q. So then you went ashore in Shanghai about a month before you went off the ship to the hospital at Tsingtao? A. That is probably correct.

Q. So you want to correct your testimony when you said that you hadn't been ashore for two and a half to three weeks prior to your leaving the vessel? A. How could I be on shore when I am at sea?

Q. Don't ask me questions. A. Well, I don't see how how I could. I did not have any opportunity. I took shore leave when I had an opportunity——

585

Q. Just a moment. I asked you a simple question. A. I see.

Q. I asked you whether you want to change your testimony now, that you did not go to shore two and a half to three weeks before you went to the hospital at Tsingtao? A. No, I don't want to change my testimony.

Q. All right. Then where did you go ashore two and a half or three weeks before you left the ship for the hospital at Tsingtao? A. Where did I go ashore?

Q. Yes. A. I didn't go ashore.

Q. Well, did you go ashore at Hong Kong? A. No, I did not go ashore at Hong Kong.

Q. Well, you were at Hong Kong from the 5th of No-

vember until the 7th, and then you made a trip from Hong Kong to Shanghai which took four days. If you did not go ashore after you arrived at Hong Kong on November 11th, it must be that you did not go ashore for over a month before you went to the hospital, is that true? A. Evidently, if it says that way.

Q. Then how did you come to make the mistake of testifying that you had not been ashore for only two and a half to three weeks before you left for the hospital? A. What mistake is that? I just generalized two and a half
587 to three weeks. I understood the question was about Shanghai, since I come back to Shanghai. That is what I understood. I couldn't very well have been ashore.

Q. Then your testimony is now that after you got back to Shanghai you did not go ashore? A. That is correct.

By the Court:

Q. That is the second time, the second time you came to Shanghai you did not go ashore? A. That is correct, your Honor.

Q. Is it your recollection then that you did go ashore at Shanghai on the first time that you arrived there? A.
588 Oh, yes, your Honor, I did go ashore then.

Q. How many times? A. Oh, possibly at the beginning, almost every free moment we had, that we could spare from the ship we went ashore to see more or less what we could of the town; then it started to wear off and we just tapered off and took it easy for the rest of the time.

Q. Roughly, can you tell the jury whether it was once or twice or a number of times? A. A number of times I would say at the beginning, your Honor.

Q. That would be between September 26th, 1945, and November 1, 1945? That would be a period of over a month? A. Over a month, your Honor, yes, sir.

By Mr. Gray:

Q. During that period you went ashore every chance you got? A. Possibly, yes; at the beginning of it.

Q. Now when you went ashore, where did you go? A. Well, I was fortunate when I first arrived in China. I met an Army sergeant who I knew back from my home town, and he started me off, knowing China. He brought me up to the place where he lived, the hotel there, stationed army soldiers, and introduced me to a few of his friends, and at the same time they were working my ship and he was 590
my guest aboard the vessel at different times, and more or less he knew—he took me around with him to different Army canteens and moving pictures that the Government showed over there, and I was—and that is what I more or less did.

Q. You went to moving picture theatres? A. Yes, sir, I went to moving picture theatres.

Q. You went around generally, you saw the town, didn't you? A. Oh, yes, certainly I saw the town.

Q. Had you ever been to Shanghai before? A. No, I had never been to Shanghai before.

Q. Had you ever been in Hong Kong before? A. No, 591
I never had been in Hong Kong before.

Q. You never sailed in Chinese waters before? A. Never.

Q. Didn't you ever go ashore at Hong Kong from the Haines? A. No, never.

Q. Well, you arrived on September 19th and you left four days later on September 23rd, and you did not go ashore at Hong Kong? A. That is right, I never went ashore at that time. The only place I went ashore on that whole trip, from the time of Shanghai, was Colombo in Ceylon, I went ashore there. I had an opportunity and went ashore with the deck engineer.

Q. And you were there just one day, on the 3rd of

592 September? A. That is right. That was only just a matter—I had a break and I went ashore and took it.

Q. Do you know why you did not go ashore at Hong Kong? A. I did not particularly feel like going ashore. It wasn't steady.

Q. You could find out very easily from the master when the ship is going to sail, about getting back? A. I did not have trouble getting back. I did not go ashore.

Q. Although you had never been there in your life? A. Although I had never been there in my life.

593 Q. You had no desire to go ashore? A. No.

Q. Were you moored to a pier? A. We were moored to a pier.

Q. You were moored to a pier at Hong Kong? A. I don't particularly recall if we was at that date. I don't believe we took any cargo or discharged any cargo, so I just don't particularly know if we did.

Q. Well, never mind. Now when you arrived back at Shanghai on the 11th of September——

The Court: The 11th of November.

Mr. Gray: I beg your pardon——

594 Q. —the 11th of November, you were healthy then, weren't you? A. Well, there was nothing physically wrong, from what I understand anybody could be. I did not feel well.

Q. You did not feel well on the 11th of November? A. That is right, approximately the 11th of November or somewhere around that.

Q. And you left Shanghai about 12 days before, hadn't you? A. Well, if it says that I imagine that is what I did. I went with the ship.

Q. And you had been ashore at Shanghai about 12 days before? A. Yes, I had been ashore at Shanghai about 12 days before. That is when I was—I took a walk at that time.

Q. And you started to feel ill about the 11th of November? A. Yes, that would be correct.

Q. When you got back to Shanghai? A. Yes.

Q. And just tell us what symptoms you had then? A. Well, at that particular time I noticed that I did have, when I turned my head or anything (demonstrating), I didn't focus correctly. It would seem as if there were a couple o. spots, and that is the way it started at that time, and I was taking more salt tablets and drinking some water, and that is the way—that is the way it first started. I felt a little weak and I couldn't focus correctly.

596

Q. Your eyes did not focus correctly? A. That is correct.

Q. If you turned your head quickly you couldn't focus correctly? A. That is correct, Mr. Gray.

Q. What was the next symptom you felt? A. Well, then after a while, as I recall it now, I started getting dizzy spells. Instead of the eyes not focusing I was getting dizzy.

Q. You were getting dizzy? A. Yes.

Q. How was your digestion around that time? A. My digestion wasn't too bad at that time. I was able to get food down.

Q. You know you had been sailing through a lot of hot climates until you got to Shanghai, is that right? A. Yes, I understood that.

597

Q. Had you had any dysentery during the trip? A. No, never.

Q. And the temperature at Shanghai was around in the 70's, wasn't it, in November? A. I do not particularly know what the temperature was.

Q. Well, was it warm? Did you go around without a coat? Did you go around in your shirt sleeves? A. I used to walk around in my shirt sleeves when I was working in the engineroom, when I did.

Q. Well, up on deck, too? A. Up on deck?

Q. Yes. A. Yes, I would walk up on deck without a

598 *Robert A. McAllister—Cross.*

shirt because I would never particularly stay out long. I had no business——

Q. Well, there was warm weather at Shanghai, wasn't there? A. Well, I would tell you if I could recall, Mr. Gray, whether it was particularly warm or not. I couldn't say. I know at one time I had a heavy coat at sea and maybe another time I did not.

Q. First your eyes wouldn't focus. Then you began to feel dizzy at times? A. That is correct, Mr. Gray.

Q. And would these spells of dizziness come on? A.
599 It started periodically, like maybe I would get up suddenly or I sart eating and sudden movements seemed to make me feel like I have to stop for a minute, because I had some dizziness from my head.

Q. You made a sudden movement, you would feel a bit dizzy and then the dizziness would wear off? A. That is the idea, Mrr. Gray.

Q. How long did that condition exist? We are starting now with the 11th of November when you arrived back in Shanghai and you had trouble with your eyes. How long did this dizziness exist by itself? A. That dizziness stayed with me for a while, but that stayed with the other symptoms I started to get.

600 Q. Well, let us take one thing. You only had one symptom at a time? A. That is the idea.

Q. How long did this dizziness continue to exist without some other symptom? A. Oh, without some other symptom. It might have been two or three or four days.

Q. Two or three or four days, then that would bring it up to, say, the 14th or 15th of November? A. Approximately, I imagine, yes, if that is what the dates add up to.

Q. Then what is the next symptom which you experienced? A. I started getting a stiff neck (indicating). That came on to me then at that time.

Q. And where did it seem stiff? A. Right back here (indicating).

Q. Right at the base of the brain? A. That is correct, Mr. Gray.

Q. At the nape of the neck? A. Right down here (indicating). At first I was beginning to think probably it was a sort throat, I was getting a very bad sore throat.

Q. Did you have a sore throat, too? A. Just had a little difficulty in swallowing, and I thought I was getting a sore throat.

Q. You know the difference between a sore throat and a lame throat? A. Oh, I had a sore throat.

Q. You did have a sore throat? A. Not at that time, 602
but I had it before, so I thought the symptoms were the same as I am getting it down here.

Q. When did you get the sore throat? A. On the ship?

Q. Yes. A. I did not get a sort throat on the ship—I know the difference between a—because I had a sore throat at one time and I couldn't swallow. I had a sore throat, and that is all it was.

Q. On this ship you had a sore throat? A. On that ship?

Q. Yes; this occasion when you say you had— A. I had difficulty—I had a pain in the back of my neck, a stiffness in the neck.

Q. And then I started getting difficulty in swallowing. 603

Q. That is, your throat wasn't sore, you just had some difficulty in using your throat? A. That is the idea, Mr. Gray. I thought—

Q. And about what date was that? A. Let me think. Well, that came on with me with about the stiff neck.

Q. That is, your throat and the stiff neck came about the same time? A. About the same time.

Q. And about when was that? A. Oh, it was about two or three days after, as I said there.

Q. That would run it up to about the 17th or 18th of December—I mean November? A. Probably, yes. That would make it around then.

604 Q. Well, if you want to refresh your recollection I will show you this Exhibit 4, which is the illness report, and then this may give you some standard to go by (handing to witness).

(Witness examines.)

Q. You see on that illness report, Exhibit 4, which I have shown you and which you signed, you reported to the pharmacist's mate on November 24th that the onset occurred that day and that you told him that day? A. No—

605

Mr. Rassner: I do not think, Mr. Gray,—

Q. Just read it.

Mr. Rassner: Just a minute. I do not think Mr. Gray is quoting the testimony correctly. If he is referring to the exhibits, that is one thing.

Mr. Gray: I am quoting the exhibit, of course.

Q. "Illness contracted: (a) Date 11/24/45.

"Place: At sea aboard.

606 "To whom first reported: Patrick E. Napier, Pharmacist's Mate.

"When: Same day."

That is clear now? A. Well, I will tell you—

Mr. Rassner: Yes, that is clear now, but that is not all the testimony.

Mr. Gray: We will take one thing at a time.

A. As you claim, Mr. Gray, we were at sea.

Q. At sea. A. And that is a time when the routine of the ship merely sets in. Of course, aboard ship I might have been getting a sore throat. You don't particularly go out of your way—

Q. I am not criticizing you at all. I am just trying to get the facts. A. Oh, that is the facts all right.

Q. So up until the 24th— A. In fact, I believe I signed this in the hospital; they just gave me some papers to sign in the hospital where I was laying, and I signed whatever they handed me.

Q. Is that your signature? A. That is not my usual signature, but I imagine it is.

Q. You signed it, did you? A. I believe I did.

Q. Now up until the 24th of November your feeling was that you had a cold or a sore throat; just a sore throat coming on? 608 A. Well, I did not until I went into the bed and then I started getting like feelings—you know, like symptoms. Then I did not know what I had, but I never thought it was anything particularly serious.

Q. You went to bed on the 24th, didn't you? A. I went to bed before—

Q. After you notified Mr. Napier that you felt ill did you go to bed immediately? A. I had gone to bed before that.

Mr. Rassner: There are two questions and they are both unfair. He said "you went to bed on the 24th", and the witness started to tell Mr. Gray that it was before, and then he starts in with the second 609 question. I think it is an unfair method and taking advantage of the witness.

Mr. Gray: Not at all.

Mr. Rassner: Well, that is what I think. I say it is unfair.

Mr. Gray: You are prejudiced.

The Court: All right.

Mr. Rassner: Now I ask your Honor to rule on my objection, on the sole ground that Mr. Gray's questions are unfair, particularly in so far as he stops the witness from answering him and puts a second question to him.

610 The Court: Well, I do not think it is very unfair. It may be—

Mr. Rassner: I will accept your Honor's ruling.

The Court: It may be that he has two questions in one. If that be so, he should change them so as to separate them and put them separately.

Mr. Rassner: My exception is on the ground that it is unfair.

The Court: I do not think it is unfair, in connection with either counsel in this case up to the present time. I think there won't be.

611 Mr. Gray: Mr. Reporter, will you please read my last question?

(Record read.)

Q. Now you had gone to bed then, prior to the 24th of November, 1945? A. I did.

Q. You are sure of that? A. Positive.

Q. Do you remember about the date that you went to bed? A. Well, I will lead up to that. You see, as I was getting ill, every chance I had off my duties I was going to bed, laying around, feeling a little loggy. Just prior to going to sea I was ill.

612 Q. You mean prior to going to sea on the trip to Tsingtao? A. Yes, on the trip to Tsingtao. I was ill then, and as there was no one aboard the ship, as I say, in port, as most people know about merchant ships that are familiar with them, the purser has a lot of duties to do besides taking care of ill people on board the vessel.

Q. We are not talking about that. We are talking about when you went to bed and stayed abed. A. All right. I stayed abed about a day and a half or two days before we left.

Q. Before you left Tsingtao— A. Shanghai for Tsingtao.

Q. Shanghai for Tsingtao? A. Yes.

By the Court:

Q. That would be around November 21st, is that right? A. Well,—

Q. You left on November 23rd, we have agreed on that. A. Yes. That would be it approximately, your Honor.

Q. It would be a day and a half? A. Yes.

Q. Now you are talking about the time when you were confined, actually confined, to your bed so that you did not get up and go to your meals and go on deck? A. That is the idea, your Honor.

Q. From that time on you remained in bed? A. I stayed 614
in bed.

The Court: All right.

By Mr. Gray:

Q. And that began on November 21, 1945? A. 21st or 22nd, something like that.

Q. But before you left Shanghai for Tsingtao? A. Yes, that is correct.

Q. And you were in bed all the way to Tsingtao? A. That is correct. 615

Q. Is that your signature there? A. Yes, that is my signature.

Q. Is this your signature here (indicating)? A. Yes, that is my signature.

Q. What day did you sign this? A. Well, it says here, November 24th and 25th.

Q. That would indicate that you were on watch in the engine room on the 24th to the 25th, is that right?

Mr. Rassner: Now I object to this. Mr. Gray is blowing hot and cold. We agreed before Judge Knox, and we have a stipulation here that he was—

that this plaintiff was not ordered on duty after he reported ill. That is a fact.

Now I see no reason why Mr. Gray should attempt to discredit the witness by anything to the contrary. It has been explained and we have agreed and stipulated thhat he did not go on duty.

The Court: Well, I don't know—

Where is the stipulation? I did not see it.

Mr. Rassner: I have it here. I offer it in evidence.

The Court: Better mark it.

(Marked Plaintiff's Exhibit 8.)

The Court: It won't take but a minute and I will read this to the jury. I think they ought to hear the facts in this case, the evidence as it proceeds. This is a stipulation on January 28, 1948.

Mr. Rassner stated: "It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the plaintiff will not claim at the trial of the above entitled action that he was ordered to stand watch or perform his duties subsequent to the time that he reported himself to be ill to the first assistant engineer.

"(Discussion between Court and counsel.)

"The Court: To whom did you report your illness?

"The Plaintiff: The first assistant engineer.

"The Court: Did you ever report it to the chief engineer?

"The Plaintiff: It was the first assistant.

"The Court: Did you ever report it to the chief engineer?

"The Plaintiff: No, not directly."

Of course that does not have any dates, does it?

Mr. Rassner: No, it does not, your Honor.

The Court: All right.

Mr. Rassner: But—

The Court: That is all there is to the stipulation.

Mr. Rassner: In so far as—

The Court: Let us get the dates now so that we can apply them to that stipulation.

Mr. Rassner: All right. Reference was made to the 24th of November as to the date of the report of his illness.

Mr. Gray: Not at this hearing before Judge Knox.

Mr. Rassner: Now if necessary we will ask Judge Knox to come here and tell who is telling the truth about that.

620

The Court: No, you won't. Both of you are telling the truth, but this is confused.

Mr. Rassner: Very well. We have withdrawn from the case our charge of negligence based on the ground that this witness was directed to work after the 24th. Now that is out of the case. On Mr. Gray's insistence as a condition of having the case go to trial before the chief engineer could be produced, I consented to it, and I anticipated that there might be some misunderstanding so I asked that a record be made of it.

If there is still any further misunderstanding—

621

The Court: I do not want to hear any further discussion about it. I think the best thing for you gentlemen to do is when we have a recess to try to get together, have the dates stipulated so that we won't have this constant wrangling.

Mr. Gray: There were no dates stipulated at all, your Honor. The stipulation stands just as it was, that this witness had not been required to work after he reported ill. We did not say when it was or anything like that.

The Witness: According to this logbook—

Mr. Rassner: Mr. McAllister, I wish you would not make any statements.

622 The Court: Let us get along with the case.

Mr. Rassner: I object to any questioning as his being required to work after he reported ill. That is out of the case. We have withdrawn it.

Mr. Gray: I am not saying that.

The Court: There is no such thing.

Mr. Gray: No.

The Court: I will overrule the objection and permit Mr. Gray to examine the witness.

623 Q. You signed this log, did you not, Mr. McAllister, indicating that you were on watch in the engine room on the voyage from Shanghai to Tsingtao, on November 24th and 25th, isn't that correct?

Mr. Rassner: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Rassner: And taken out of the case.

A. According to that log it would show that.

Q. This is your signature, isn't it (indicating)? A. Yes.

Q. You did not sign a false entry in the log, did you?

624 Mr. Rassner: Now that is objected to as being entirely unfair and uncalled for.

The Court: Objection sustained.

Q. Isn't that your signature?

Mr. Rassner: That has been answered, that it was.

The Court: He says it is his signature—isn't that right?

The Witness: If I get a chance to explain it.

The Court: Yes, you will have every chance.

Q. Now, then, on this date of November 23rd to 24th, 1945, is that your signature there (indicating)? A. That is correct.

Mr. Rassner: Objected to on the ground that that matter has been taken out of the case. 625

The Court: Overruled.

Q. And is this your signature here (indicating)? A. That is correct.

Q. And that would indicate that you were on watch between what hours?

Mr. Rassner: That is objected to. The log speaks for itself.

The Court: Objection sustained. 626

Mr. Gray: All right.

Q. You signed as having stood two watches on this day, from November 22nd to November 23rd, is it not true? A. Yes, I did sign it.

Mr. Gray: I offer the log in evidence.

The Court: It is in evidence, is it not?

Mr. Gray: No, sir, it isn't in evidence yet.

Mr. Rassner: I object to the log in evidence on the ground that we have been required, on behalf of the plaintiff, to withdraw our charge of negligence based on the ground that the defendant caused this man or permitted this man, this plaintiff, to stand his watches after he reported ill. We cannot charge them faults, and they have no right to go into it. 627

Mr. Gray: I am not charging any fault. I am just showing this witness—

Mr. Rassner: I object to it.

Mr. Gray: —he says that he was in bed from the 21st on, and I have shown that he was on watch on the 23rd, 24th and 25th.

The Witness: You did not show I was on watch—

The Court: Wait a second now.

This first one is the 24th and 25th, is it?

Mr. Gray: Well, there is the 22nd and 23rd, 23rd and 24th, 24th and 25th.

The Court: Is that all you are going to ask about this?

Mr. Gray: Yes, sir.

The Court: Better mark it in evidence.

Mr. Rassner: If the Court has no objection, I understand that Dr. DiFiore has certain engagements. I was wondering if we might suspend with this witness.

629 The Court: Well, let us get through with this particular part of it and then there is no objection, so far as I can see, of calling him out of turn.

(Marked Defendant's Exhibit D.)

The Court: That is the engine room log, is it?

The Clerk: Engine room log, yes, your Honor.

Mr. Gray: That is the rough engine room log.

Q. Now, Mr. McAllister,—

The Court: Wait a second. He wanted to make—

Mr. Gray: I am going to ask him to make it.

The Court: All right.

630 Q. You stated you had some explanation to make. A. I did.

Q. I want to be perfectly fair with you and give you a full opportunity to explain that apparent discrepancy. Now will you please explain to the jury—

Mr. Rassner: I object to the form of that question.

The Court: Yes, "apparent discrepancy," strike that out. The question is, You had something to say.

The Witness: That is right, your Honor.

The Court: All right.

The Witness: May I say it now?

The Court: Sure.

Q. Go right ahead. A. Well, it is a custom aboard ships —most ships I have been on anyway—that there is money involved in standing these different watches, and if a man don't believe at the particular time—he thinks his illness is not so serious, he might have an opportunity to still stay on the job and perform his duty at a later date, engineers fill in for him, they take up the slack. In other words, what one man's sickness would otherwise account for, and they allow him to sign the log just as if he had stood his watch and everything else. That is a custom which, Mr. Gray, I believe you will be familiar with, con- 632
nected with a steamship company.

Q. You are asking me? A. No, I didn't ask you. I said it. I said I believed you would be familiar with it.

Q. I have no knowledge of any such custom. A. Well, it wouldn't be hard to find out.

Q. So then what you want to tell the jury now is that when you signed those watches, signed as a watch officer on watches during the 22nd, 23rd, 24th and 25th of November, 1945, you did not stand the watches? A. That is correct.

Q. Who did stand them? A. The engineer—the engineers would explain that. You can ask the first assistant.

Q. No, please tell me what engineers did stand the 633
watches on the 22nd and 23rd. A. Well, the log was always brought up to me by the first assistant engineer. He brought up the log to me and I signed it.

Q. You don't know who stood the watch? A. Not particularly, no.

The Court: Whose handwriting is it purported to be in?

Mr. Gray: His handwriting.

Mr. Rassner: It is the plaintiff's handwriting—there is no question about it.

The Court: I meant the handwriting—

634 *Robert A. McAllister—Cross.*

Mr. Gray: Of the log entries?

The Court: The entries themselves.

Q. Are you familiar with the handwriting of the other engineers on board the ship? A. Not too familiar, but I imagine I can recognize it.

Q. Whose handwriting is this, appearing above your signature on the date of November 24th and 25th? A. That is—

Q. Above your signature. A. That's mine. All the
635 entries are mine.

Q. They are all your entries? A. Certainly.

Q. And these entries include "hot-well" at 1.20. What is "hot-well"? A. "Hot-well"?

Q. Yes. A. That is the water supply before it goes into the boilers.

Q. After it has been changed from steam back to water? A. That is right, from the condenser it comes into the boiler.

Q. And 1:05, the discharge—that is the temperature of the water being discharged from where? A. Overboard, I believe—yes, that is it.

Q. Then you have a statement here "Temperature of
636 main steam, 465"—what does that mean? A. That would be the steam—the superheated steam or the steam going into the engine, I believe—yes, that is it, the steam going into the engine.

Q. But all of these figures in this scale above your signature on the 24th and 25th—that is in your handwriting, isn't it? A. Certainly.

Q. And this is indicated at 4 p. m., is it not? A. That is right, 4 p. m.

Q. And that was the watch that started at 12 noon on November 24th? A. That would be the watch that started at 12 noon on November 24th.

Q. And ended at 4 p. m. on that day? A. That is correct, Mr. Gray.

637

Q. Now down here on the next watch, which started at 12 midnight and ended at 4 a. m. in the morning— A. Yes.

Q. —are these your figures in this scale above your signature? A. No, I don't think they are my figures, no.

Q. Are some of those figures yours? A. Most of them are.

Q. Most of them are. That is on the 24th and 25th? A. Yes.

Q. Now we will go back to the 23rd and 24th. Your watch was from 12 noon to 4 p. m. or from 12 midnight to 4 a. m.? A. That is correct.

638

Q. And that is the regular second assistant's watch? A. That is correct, sir.

Q. Now above your signature here, on November 23rd and 24th in this scale, are those your figures, your handwriting (handing and indicating to witness)? A. Yes, I believe that is them, too—that is mine, too.

Q. And from 12 midnight to 4 a. m. on that date, above your signature, is this your handwriting in this scale, too (indicating)? A. Yes, sir, I believe it is.

Q. And that applies, does it not, on the 22nd and 23rd, the first watch? A. Let me see that (examining). Yes.

639

Q. That is your handwriting, isn't it? A. Yes, that is correct.

The Court: Is that all on that point?

Mr. Gray: Yes.

Mr. Rassner: Would you mind sitting over there for a moment.

(Witness temporarily excused.)

640 *John A. DiFiore—Direct.*

JOHN A. DIFIORE, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Rassner:

Q. Are you a duly licensed physician and surgeon in the State of New York? A. Yes, I am.

Q. What school did you graduate from? A. Creighton University.

Q. And will you let us have your qualifications in medicine.

641

The Court: Where is that located?

The Witness: Omaha, Nebraska.

The Court: What is the name of the college?

The Witness: Creighton.

Q. Will you let us have your qualifications in the field of medicine ever since your graduation? A. Well, I interned at St. Vincent's Hospital, New York City, from March, 1943 to January 1, 1944.

I was a resident on pediatrics at St. Vincent's Hospital, January 1, 1944 to October 1, 1944.

I entered the Army October 7, 1944, and was discharged

642 October 18, 1946. My service in the army consisted in the practice of neurology and a small amount of psychiatry. I was chief of neurology at England General Hospital in Atlantic City.

Q. That is a United States Government Hospital? A. Yes, U. S. Army General Hospital.

Q. Now, were you in charge of the particular division of the England General Hospital which treated poliomyelitis cases of the boys that came down with polio overseas? A. Yes.

Q. As well as or this side? A. Yes. On my ward I had all the polio cases that were admitted to that hospital.

Q. You were in complete charge, is that right? A. Yes, sir.

Q. Now, Doctor, at my request did you examine Mr. McAllister, the plaintiff in this case? A. Yes, sir, I did.

Q. When did you examine him? A. I don't recall the exact date. It was sometime last week.

Q. Where was the examination? A. In my office.

Q. Will you please tell us the nature of your examination—maybe this will refresh your recollection as to the time you made the examination (handing to witness). A. Yes. I examined Mr. McAllister on January 21, 1948.

Q. Will you please tell his Honor and the jury just what the nature of your examination was and your observations and conclusions. A. Yes. Well, first of all I proceeded to take a history on this patient to find out how his illness started, when it started, and what were his afflictions at the time. 644

Q. I show you Plaintiff's Exhibit 5, and perhaps that might help you in giving your full description of the history (handing to witness).

Mr. Gray: Well, if he had that before him at the time it would.

Mr. Rassner: Would you mind if I—

May I respectfully ask the Court that I be permitted to conduct this examination my way? 645

Mr. Gray: I think it is improper his way.

Mr. Rassner: It is in evidence.

The Court: I do not need to say anything.

Mr. Rassner: Very well.

Q. Dr. DiFiore, will you please explain the history, referring to Plaintiff's Exhibit 5 as well as your own information. A. As I recall, and with the help of the history here, Mr. McAllister told me that he was feeling sickly, he was feverish, he had a headache. That was about the 24th of November.

He told me he was aboard the Edward B. Haines which was off Shanghai, China. In a short time, within a day

646 *John A. DiFiore—Direct.*

or so, he noticed difficulty in swallowing, in chewing, and he said that his face became weak. He told me that he lay in his bunk awhile and within a matter of a few days he felt a weakness of his left arm and both lower legs, and in a pretty short time he was paralyzed in the left arm and from the waist down. That was the history I obtained from him.

Naturally, I was anxious to know what had been done for him since I had had experience with these cases. I was surprised to learn—

647 Mr. Gray: I object to the "surprise".

The Court: Yes.

A. (Continued) I learned from him that he lay in his bunk for awhile, and I asked him if he was given any hot-pack treatment, the so-called Kenny treatment, and he said he wasn't given any form of treatment of that nature until some time later— I don't know the exact interval offhand.

I continued with my examination and found that there was marked atrophy or wasting of all the muscle groups of both lower extremities, with complete paralysis, with
648 the exception of some motion in extending the right toes and foot. All the deep reflexes in the leg were absent.

There was partial atrophy and paralysis of the left pectoralis muscle—that is the anterior chest muscle—the left triceps and the left bicep muscles, with weakness in the function.

I also noticed—you asked me my observations. Naturally, the patient came in on crutches, wearing braces, and it was quite difficult for him to walk. Also it was quite difficult for him to maneuver himself in undressing himself and getting on an examining table, and assisting him in some small way in moving himself.

Q. Can you point out the type of braces that he wears on his legs (handing book to witness)?

Mr. Gray: I did not get that question.

(Question read.)

(Witness examines the book.)

The Court: I wonder if it is necessary to elaborate on that. It is quite evident exactly what he is suffering from and what the extent of his injury is.

Mr. Rassner: All right, I won't press it. We happen to have had that before, but we lost the place.

Q. In any event, will you tell us in lay language, if you will, what the industrial utility is that remains with Mr. McAllister at the present time. A. At the present time he has, for practical purposes, no use of his lower extremities. He has weakness of the left upper arm, but there is good function of the hand. 650

For industrial utility he can do sedentary type of work with the use of his hands. Lots of these cases are trained to do sedentary work; for example, working on radios and jewelry work. Those are the two main occupations for which this type of case is trained and for which we also train them in the Army.

Q. Would he ever again be able to do work at sea? 651

Mr. Gray: We concede he wouldn't. Let us not go into that.

Mr. Rassner: Very well.

Q. Now, Doctor, are you familiar with the Kenny treatment? A. Yes, sir.

Q. Will you please describe it to us—I withdraw that question.

Is that the treatment that is accepted by the United States Army? A. Yes.

Q. As the treatment to be given to patients at the U. S. Government Hospitals? A. Yes.

652 *John A. DiFiore—Direct*

Q. And is that the treatment that you approve of as the best treatment? A. Yes.

Mr. Gray: For what?

Mr. Rassner: For polio.

Q. Will you please tell us what it is. A. The Kenny treatment consists of the use of hot wet packs. These hot wet packs are usually in the form of these old Army woolen blankets, because they retain the heat mosture longer than most any other material.

653 These hot wet packs are—first of all, they are put in very hot water. We have to be very careful not to burn ourselves. They are wrung out with a very old-fashioned clothes wringer, and then the hot wet pack is wrapped around the leg or the arm, wherever the paralysis—I take that back—wherever the apparent involvement with spasm is. The principle is that the first sign of involvment of the muscle is a severe spasm of the muscle. A spasm is a tightness or a cramp, and it is that tightness or cramp which causes the pain. That pain in turn causes the other muscles which compose that muscle or group, to be overstretched in order to make up for the difference in the
654 length of the muscle, and the opposing muscles suffer pain, too, because they are overstretched.

The end result is that if that is not corrected with these hot, wet packs there is a vicious cycle produced. Not only is the muscle injured and eventually deformed, but the muscle which was originally not injured but which had to be pulled away to counterbalance the injured muscle, that is also injured, too.

So therefore the idea of this hot, wet pack is to relax the spasm of the involved muscle and put the patient at rest by relieving his pain.

When that is accomplished, then the muscles are relaxed and they can function more normally.

Q. Will you please describe the incoordination that takes place. A. Well, it naturally follows that if one muscle is in spasm, If I may use gestures I think it might be easier—for example, if the biceps muscle is in spasm (demonstrating), let us say it is afflicted with polio, there is spasm here (indicating), which sort of contracts the arm.

To overcome that spasm the antagonistic muscle, in other words, the muscle that pulls in the opposite direction, which is the triceps, is overstretched to make up for the slack (indicating), and in the overstretching of that muscle plus the spasm here (indicating), there is no coordination 656
between the two muscles, so therefore the patient cannot do this (demonstrating).

This motion is produced by the biceps (demonstrating). And this motion by the triceps (demonstrating).

Q. Showing a flexion of the arm at the elbow. A. Yes. The biceps produces flexion of the arm at the elbow, and the triceps produces extension. So therefore, to reiterate, if both muscles are in spasm there is incoordination, and that leads to the third concept of the Kenny principle, which she describes as mental alienation, which I also like to describe as muscle alienation, which means not only that the patient forgets how to use the muscle that originally 657
was not involved, but he sooner or later gets to the point where he cannot use that muscle which was originally not involved but which has become involved because of the spasm of its opposite or antagonistic muscle.

Q. Now in your application of the Kenny method, to your patients, what results did you observe?

Mr. Gray: I object to it. It does not appear that he did apply the Kenny method. Why don't you ask him and see if he did.

Mr. Rassner: I thought I did ask him that question.

658 Q. Did you use the Kenny method in your hospital? A. Yes. Let me explain it this way: Most of my cases came to me in the, let us say, the convalescent phase. Those cases had already received the Kenny treatment overseas —all my patients came from overseas.

About three cases that I can recall quite specifically, came to me still in the sub-acute stage. In other words, where the illness had been present for, let us say, three weeks or a little more, and they were still in muscle spasm. In those cases I personally had an opportunity to institute immediately the Kenny treatment, that is, to continue
659 actually the Kenny treatment which had been instituted at a previous base.

Q. What result did you find followed the use of the Kenny treatment? A. The results to me were quite dramatic, and that is that the pain is quite quickly relieved. Once the pain is relieved that vicious cycle that I spoke about is broken up. The spasm is relieved. The counterbalancing muscle or the antagonistic muscle is no longer overstretched, and that is relieved so the patient is at rest, and as long as we can prolong that state—and I might add that I didn't finish my description of the Kenny method before—that we use these packs about every two hours.
660 The pack is left on at least twenty minutes at a time, and the packs are put on every two hours, between the hours of eight in the morning and eight at night, and in one or two of my cases, why, I even went beyond those hours because there was such a good benefit from it, that the more moist heat there is on the better the results.

I think I lost my place.

Q. You were speaking of the results that you observed. A. Oh, yes. The results to me were dramatic, in that, as I said before, the spasm was relieved and the pain was relieved and the muscles were kept relaxed, and as we prolong that state we can get to work on the motion of those muscles with the patient. Our next step is gentle, passive

motion. By that I mean, for example, we pick up the patient's leg, and if he has had involvement of the thigh, we very gently flex his leg (demonstrating). At that stage he usually has no pain, but at the same time we want to be very cautious not to bring back the pain for him.

Q. Is the time element as to when treatment is first instituted of any significance?

Mr. Gray: That is objected to because this witness has not yet shown himself qualified. He has had patients who are convalescing.

The Court: I will let him testify. Then you may cross-examine. 662

A. Absolutely.

Q. Will you explain that. A. From my observation of the cases that came to me in the convalescent stage, let alone the sub-acute phase—

Q. Have you familiarized yourself with the leading works on the subject? A. Yes, I am familiar.

Q. Will you please tell us whether or not there is an accepted opinion by the medical profession as to the importance of prompt and immediate treatment? Is there such a generally accepted opinion amongst the medical profession? A. Well, I think it is conceded today that the generally accepted treatment is the Sister Kenny treatment. 663

Q. All right. A. Which consists—

Q. Is there a generally conceded opinion as to the relative importance of the time element in the application of the treatment? A. Absolutely.

Q. And what is that? A. The earlier the treatment is started the better are the results. If you get a patient who is already in a paralytic stage the hot applications are not going to do much good.

Q. Is it a question of days or months or weeks or hours? A. Oh, no. You might say hours, but frequently it takes several hours to make the diagnosis. Let us say a question of a day or two. In other words, as soon as the paralytic stage appears, which is usually within three days after the fever and the headache and the vomiting that they occasionally have. It is not a question of weeks.

Q. Do you agree with Dr. Lewin's statement that it is a question of minutes?

Mr. Gray: Just a minute. Show the witness Dr. Lewin's statement and let him read it.

Mr. Rassner: Exactly.

Mr. Gray: What is the title of the work?

Mr. Rassner: "Infantile Paralysis, Anterior Poliomyelitis," by Dr. Lewin.

Q. Is Dr. Lewin considered an authority on the subject? A. Absolutely. I knew Dr. Lewin personally in the Army.

Q. Do you know what Dr. Lewin says with reference to the time element in the institution of the treatment? A. I am not familiar with his remark on that. (Examining book.)

The Court: Suppose we take a recess for a few minutes. I imagine you will be here a little while longer anyhow.

(Short recess.)

Q. I show you this book by Dr. Lewin and call your attention to Chapter X on page 79, and I will ask you if you agree with that statement (handing to witness).

Mr. Gray: May the statement be read in the record?

Mr. Rassner: Certainly.

667

Q. Will you read it to us, please. A. You mean the underlined statement?

Q. Yes. A. The title of the paragraph is "Importance of Early Diagnosis—The importance of diagnosis prior to the moment at which the virus attacks the nerve cells of the spinal cord cannot be overemphasized. Diagnosis and treatment should be considered in terms of minutes and hours, not days."

Q. Do you agree with that? A. Yes.

Q. Do you agree with that second part that is underlined? Will you read it, please? A. The second paragraph: "In the presence of the symptoms, signs, and physical observations mentioned, a presumptive diagnosis of early acute poliomyelitis may be made; then a lumbar puncture should be performed to aid in establishing the diagnosis."

668

Mr. Gray: May he read also those symptoms? Let us get that in.

Mr. Rassner: That is all I want for the time being. You can cross-examine.

Q. You say you know Dr. Lewin? A. Yes, sir.

669

Who is he? A. Dr. Lewin is an orthopedist—(examining book). Dr. Philip Lewin is associate professor of bone and joint surgery, Northwestern University Medical School; professor of orthopedic surgery, Cook County Graduate School of Medicine; attending orthopedic surgeon, Cook County and Michael Reese Hospitals; consulting orthopedic surgeon, the Municipal Contagious Disease Hospital, Chicago.

I might add to that that he was a major in the Army. He was chief of the orthopedic section of Christian General Hospital in Framingham, Massachusetts.

Q. Did you ever hear of Dr. Robert L. Bennett of Warm Springs, Georgia? A. I have heard the name, yes.

670 Q. Is he a recognized authority by the medical profession?

Mr. Gray: That is objected to. The witness has had difficulty in remembering his name. I think he had better say what he knows about him, without saying that he is a recognized authority.

The Witness: I merely stated that I heard the name.

Mr. Gray: That is all?

The Witness: That is all, yes.

671 Q. Do you agree with his findings and views—

Mr. Gray: I object, your Honor. There is no foundation laid. We do not know what Dr. Bennett's background is, whether he is in a position to say anything authoritatively.

Mr. Rassner: Very well, I won't press it.

Q. Will you explain to us the reasons for the need of treatment in a matter of minutes, not hours or days and before confirmation of diagnosis.

672 Mr. Gray: Just a minute. He did not say "before confirmation of diagnosis."

Mr. Rassner: I will take your Honor's ruling.

Mr. Gray: There is no foundation laid.

The Court: I will let him answer the question.

A. The remark offhand is contradictory. One cannot treat a condition in which he does not know the diagnosis.

Q. Well, what I had in mind was tentative diagnosis, before it is confirmed by clinical tests, such as a spinal tap: A. Yes. Well, once the tentative diagnosis of polio is made the treatment should be instituted immediately, that is, there is no point to waiting, let us say, until the

spinal fluid chemistry is done by the laboratory and the cell count is made, and by the time the reports come back, why it is a question of several hours. The treatment no doubt should be instituted as soon as the suspicion of polio is made.

Q. What are the factors which impel you to such procedure? A. Well, the physical signs and symptoms, that is, the presence of headache, possibly nausea and vomiting, fever, stiffness of the neck and spasm of the muscles with tenderness and infrequently twitching of the involved muscles. 674

Q. Supposing a man were confined to bed complaining of pain in the back of his head, behind his left ear, with a stiff neck, and felt as if his entire body, with the exception of the right arm, had been burned. Would you say that those symptoms were enough to indicate immediate hospitalization and treatment? A. Yes, sir.

Q. Now what would be the end results, with a reasonable degree of medical certainty, by delayed treatment, say, from November 24th to December 1, 1945?

Mr. Gray: That is objected to as too speculative because it hasn't given the doctor the necessary foundation upon which he can base an opinion. 675

The Court: I will let him testify.

Q. You mean in a case diagnosed as poliomyelitis? A. Let me put it to you this way. Let me give you the facts. I will withdraw the previous question.

Assume that Mr. McAllister for several days, one or two days before the 24th of November, 1945, was not feeling well and had to go to bed right from his watches, and stayed in bed; that on or about the 24th of November, 1945, he was actually confined to his bed with stiff neck, with a feeling of his whole body having been burned, with the exception of the right arm; with difficulty in moving his

676 *John A. DiFiore—Direct.*

body or his limbs; with a feeling of apprehension that when people came in to see him he wants them to go out; with difficulty in moving his jaw, inability to swallow any solid food, and difficulty in swallowing even liquids.

Would those symptoms be enough to put any doctor on notice that the patient may be or was a polio victim?

Mr. Gray: That is objected to. "any doctor" is so broad. It depends upon the doctor's training and experience.

677 Mr. Rassner: I said any licensed physician.

The Court: I will let him answer.

A. Yes. Those symptoms are so obvious, at least of some paralytic disease, to say the least.

Q. What would those symptoms indicate as to the need of treatment? A. Well, those symptoms to me indicate a rapid onset and apparent progression of infantile paralysis, of poliomyelitis. That would be my diagnosis, if those symptoms were presented to me.

Q. Are they pretty well known to the medical profession? A. Yes.

Q. It is not an uncommon disease, is it, today? A. No,

678 sir.

Q. I might add the word "unfortunate."

Now assuming that Mr. McAllister had these symptoms on the 24th of November and was left to lay in his bunk until the 1st of December, can you state with a reasonable degree of medical certainty as to what effect such lying in his bed would have upon the end result? A. Well,—

Q. With a reasonable degree of medical certainty. A. In my opinion—

Q. Yes. A. The end result is here seen.

The Court: "The end result is" what?

The Witness: Is here seen in this case. In other

words, the end result of lying in bed for a period of time with no treatment. That is my opinion.

Q. In other words, you would expect this result if the treatment were delayed from November 24th to December 1st under the circumstances which I have indicated? A. Yes.

Q. Now let us take the other assumption. Assuming that he had been given immediate Kenny treatment, or within a day or so of his being confined to his bed, while the vessel was still at Shanghai and before it left Shanghai, and given treatment at a United States Army Hospital ship 680 or a United States Navy Hospital ship, what, with a reasonable degree of medical certainty, would be the end result? A. Well, I believe that that type of patient on whom treatment was instituted immediately would have a very good prognosis.

Q. Well, give us all the details. What would you expect? A. By that I mean I would not expect him to show the widespread and severe paralysis, the extreme uselessness.

Q. With a reasonable degree of medical certainty would that eliminate the danger of stiff joints? A. Oh, absolutely.

Q. Would that eliminate the complete atrophy or de- 681 generation of the muscles? A. Of most of the muscles.

Q. In other words, would it eliminate the danger of the muscles becoming so involved that they could not function for the average work of a seaman? A. Of most of the muscles.

Q. Suppose you tell us what assurance, with a reasonable degree of medical certainty, there would be of the man returning to his usual form of occupation if he were given prompt treatment? A. That is very hard to answer.

Q. I mean, what is your opinion?

Mr. Gray: He stated it is very hard to do so. You haven't given him enough facts.

682 *John A. DiFiore—Direct.*

Mr. Rassner: May I have the answer to my question?

The Court: Yes.

A. That is very hard to answer, because it depends upon the individual case. Each case of polio—

Q. Let me reframe the question.

Mr. Gray: Please let him finish the answer. He said, "Each case of polio."

Mr. Rassner: Well, he has not answered my
683 question. I haven't given him a question which is easy to answer. I will try to make it a little simpler.

The Court: I don't think he finished his answer that he was giving you, however.

A. Each case of polio is afflicted in different parts of his body, and is left with different paralyses.

Q. Let us confine my question then to Mr. McAllister. You have examined Mr. McAllister; you have examined the history and hospital records of Mr. McAllister, is that right? A. Yes, sir.

Q. Now let us assume that Mr. McAllister came down
684 with the symptoms that I have described, and let us assume that he was immediately or within a day or so, before the vessel left Shanghai, taken off the ship and given treatment, the Kenny treatment; what with a reasonable degree of medical certainty would be the end result, if you can tell us what your opinion is? A. Well, in my opinion, judging by the fact that this patient had some paralysis of the palate which prevented him from swallowing, he had some paralysis of the face, and those two paralyses apparently cleared by themselves without treatment.

In my opinion, if treatment of the other parts of his body which were also afflicted—if treatment was instituted there, I believe that he would be a useful individual today;

in other words, I believe that the greater majority, at least, of his present disability would have been forestalled.

Q. Would you consider that he would have recovered sufficiently to have full industrial use of his legs and left arm? A. It all depends on what is the industry he is in.

Q. Well, going to sea, as a seaman? A. If you mean walking about, that would be considered industrial usefulness.

Q. Yes, sufficiently recovered to go back to sea? A. Yes, that is quite possible.

Q. And there would have been no joint stiffness, I think you told us that before? A. That is right. Joint stiffness is an obvious case of neglect if there is actual stiffness of the joints. That I don't believe we see too much today. 686

Q. I just want to ask you one question more. Do you know who Dr. Frant is? A. Dr. Frant?

Q. Yes. A. Dr. Frant is the epidemiologist for New York City. He is over at Willard Parker Hospital.

Q. What is his standing in the profession as an epidemiologist? A. Well, he is epidemiologist for New York City, and being epidemiologist for New York City Department of Health, in my opinion is a pretty high standing.

Mr. Rassner: That is all. 687

Cross Examination by Mr. Gray:

Q. Have you had any connection with Dr. Frant at all? A. The only connection I can recall is that Dr. Frant examined me for my National Boards which I took for my license to practice.

Q. He is not a technician, is he? A. In what sense of the word?

Q. In epidemiology? A. I don't get the point of the "technician".

Q. You mean you cannot answer the question? A. No, I don't understand your question, sir.

688 *John A. DiFiore—Cross.*

Q. If you don't understand the question I cannot make it any clearer. A. Well—

Mr. Rassner: That is the end of it.

Q. How old are you, Doctor? A. Thirty years old.

Q. You were in the Army? A. Yes, sir.

Q. What was your rank when you were discharged? A. Captain.

Q. Captain of the Medical Corps? A. Captain of the Medical Corps, U. S. Army—Army of the United States.

689 Q. What was the name of the hospital with which you were connected in England? A. No, it was not in England; it was the England General Hospital in Atlantic City, New Jersey.

Q. Oh, I see. So you did not handle any cases abroad. You spent your time here in this country? A. Yes, sir.

Q. You did not get over to France or—. A. No, sir.

Q. To the front at all? A. No, sir.

Q. Now when did you get your license to practice medicine, what year? A. 1944.

Q. You have then been a little over three years in the business of practicing medicine? A. Yes, sir.

690 Q. Do you maintain an office here in New York? A. Yes, sir.

Q. Where is your office? A. 44 King Street, Manhattan.

Q. And what type of cases, what type of medicine do you practice today? A. I practice general medicine, which is mostly internal medicine, and diseases of children.

Q. You are a pedatrician? A. No, sir; specifically not. I have had special training in pediatrics, but I am not classified as a pediatrician.

Q. I see. You only started into private practice after you left the Army? A. Yes, sir.

Q. You never studied the epidemiology of polio at all, Doctor?

691

Mr. Rassner: Now I object to that. We have not produced this man as an expert in epidemiology.

The Court: This is cross-examination.

Mr. Gray: I just want to make sure that you do not claim he is.

Mr. Rassner: I have not asked any question along these lines. I object to it.

The Court: Overruled.

A. My only experience with epidemiology has been through the textbooks and studying the epidemiology of various diseases other than polio also. 692

Mr. Gray: I did not get the first part of the answer.

(Record read.)

Q. And what technical experience have you yourself had in the treatment of polio cases? A. Yes. As I said before I have treated cases with the Kenny treatment.

Q. Three patients? A. Yes, sir.

Q. You did it yourself or did you have a nurse do the work? A. Well, naturally we had the nurses do it, and physiotherapists also, under my direction. 693

Q. You were in command of the hospital? A. No, sir. I was in charge of the ward in which I handled all of the polio cases.

Q. How many beds did you have in that ward? A. 76 beds.

Q. Now, do you know how the polio virus affects the patient or the victim? Just describe how it affects the victim, how it enters the nervous system. A. Yes. The germ is, first of all, carried usually through water or excreta or food somehow, and it usually enters the afflicted person through the mouth and goes into the intestinal tract and from there it is carried into the lymphatics, and eventually reaches the central nervous system.

Q. The central nervous system— A. Is the brain and spinal cord.

Q. —the brain and spinal cord. A. Yes.

Q. And when it reaches the brain or spinal cord, what happens? A. It seems to have a selective action in picking out the so-called motor cells which supply the muscles of movement, that is, either the muscles of the face or respiration or the muscles of the body, the arms, or legs, the trunk.

Q. That is, the nerves that permit the movement of various parts of the body? A. Yes, sir.

695 Q. And where are those cells? A. Those cells are located in the anterior horn of the spinal cord and in the brain stem they are located in the nuclei of the various cranial nerves affected.

Q. Like the bulb of the olfactory nerve? A. Well, it does not damage the olfactory nerve. I think I know what you have in mind. The older, original theory was that the virus entered through the respiratory tract and climbed into the central nervous system through the olfactory nerves, but the cranial nerves with which it is involved are those affecting the muscles of swallowing. In other words, the ninth and tenth nerves, and the muscle affecting the diaphragm which holds in the respiratory excursions.

696 Q. The respiratory muscles of this plaintiff were not involved so far as your observation went, isn't that correct? A. That is correct.

Q. If they had been involved it would have been a serious matter of keeping him alive, would it not? A. Yes, sir.

Q. Now when the virus attacks a nerve cell what becomes of the cell? A. The cell usually swells up, and if it is severly afflicted that cell will burst and die. However, if the attack, let us say, on the cell is not a strong one, that cell will go back to its normal function.

Q. It depends then upon the force of the attack of the virus on the nerve cells, does it not? A. Yes.

Q. And where are these nerve cells; that is, what type of nerve cells do they attack?

Mr. Rassner: I think that has been answered. We are going over the same thing a second time.

Mr. Gray: Please don't interrupt, Mr. Rassner.

Mr. Rassner: I do object to repetition. It has been answered. I have been following these questions. It has been answered—asked and answered. I object to going over it twice.

Mr. Gray: Well, the question was—

Mr. Rassner: My objection is addressed to the Court on the ground that it is a repetition.

The Court: I will let him answer. 698

A. The cells are in the anterior horn of the spinal cord.

Q. What kind of matter is that, gray or white? A. That is gray matter.

Q. You did not say that before.

Mr. Rassner: I object to that as argumentative.

Q. You did not say that before? A. No; that is purely a descriptive term, because it appears gray.

Q. Now a cell, a nerve cell of the gray matter that has once been destroyed by a polio virus never replaces itself, does it? A. No, sir. 699

Q. And if all of the nerve cells affecting a particular motor nerve of the person were destroyed in the spinal cord there would be no way of restoring motion to that part, would there? A. That is very difficult to answer because we do know that in the nervous system, being that there is such an over-abundance of cells, either in the brain or in the spinal cord, that very frequently new parts or let us say old parts that did not function in that previous action before, will come in and take over the function. If I may explain that a little further. For example, in the brain we have millions and millions of nerve cells, only a fraction of which we are using at any one time; and if the

brain is injured in a certain area, there is always an over-abundance of cells which can be reawakened, let us say, to take over the function that has been destroyed.

Q. But we are not talking about the brain. We are talking about— A. Well, the same thing happens in the spinal cord.

Q. All right. Then on your theory Mr. McAllister will get well because the nerve cells in the spinal cord will be replaced and he will be able to use his legs again? A. No, sir.

701 Q. Then why do you give us such a theory when it does not work out in practice? A. It does work out in practice. My theory, the so-called theory—you asked me if once all the cells are destroyed is there complete loss of function. That isn't so, because of my theory, which does work out.

Q. Do you know of any case where nerve cells in the case of polio have been replaced and the function has been restored to the motor nerves? A. Speaking about nerve cells, they are not replaced. That is an unfortunate feature of the central nervous system. Once a cell is destroyed that cell does not regenerate. There is no regeneration.

Q. Now in your answer to Mr. Rassner, as I recollect, you stated that it would be advisable to have a spinal 702 puncture to check on whether or not these symptoms that he described to you were clearly that of a polio condition. Is a spinal puncture necessary for that? A. Oh, absolutely.

Q. It is absolutely necessary? A. Yes, sir.

Q. And before you have a spinal puncture it is impossible to diagnose a polio accurately, is it? A. No, sir. Any laboratory means, whether it is a spinal puncture or urinalysis or anything else is purely an adjunct to a clinical diagnosis.

Q. And the purpose—would you start to treat a patient for polio without having a spinal puncture, without any spasm present? A. Well, if there were no spasm there would be nothing to treat in the muscle.

Q. Exactly; exactly. Then you cannot do any treatment of a muscle until the spasms start, can you? A. That is right.

Q. And you cannot give the Sister Kenny treatment until you know where to treat, can you? A. That is right.

Q. And it cannot be done until you get a spasm? A. Well, I can modify that by saying that if the patient feels some pain in a muscle, the spasm may not be obvious to the observer, but if he has pain there and could feel that the pain is in the muscle, with the apparent uselessness and the presence of headache and fever, and the stiff neck— 704
if you feel that they are polio, you will be able to predict quite easily that those painful muscles will sooner or later show obvious spasm to the observer, but the patient feels the pain because the spasm is there already.

Q. Certainly. Therefore you cannot treat a muscle or a spasm until you know that the spasm is present in the muscle.

Mr. Rassner: That is objected to. It is the opposite of what the doctor said. I object to Mr. Gray—.

Mr. Gray: That is cross examination of the witness. 705

Mr. Rassner: I object to Mr. Gray misquoting the testimony. I take exception to the statement that the purpose of cross examination is to misquote the witness and state the opposite of what he said.

The Court: I do not find anything like that. It may be a misunderstanding. There is nothing that I find to be a deliberate misstatement.

Mr. Rassner: I object on the ground that there has been a misunderstanding on the part of Mr. Gray as to what the witness has just said, in answer to the previous question.

The Court: I will overrule the objection and the witness can clarify it if he wants to.

706 Mr. Gray: May the question be read back so that we may have it in mind?

Mr. Rassner: May we have the previous question and answer read? Maybe Mr. Gray won't have the misapprehension then as to what the witness said.

(Record read.)

The Witness: Will you repeat the last question?

(Last question read.)

Q. Do you want to change that, Doctor? A. No, that isn't so. I think you asked me if—

707 Q. Did you—

Mr. Rassner: May we have his answer?

Q. It is your answer that—

The Court: Just let him answer. He can take care of himself. You do not have to help him.

Mr. Rassner: I object to Mr. Gray interrupting the witness.

The Court: All right, go ahead.

708 A. We frequently treat painful muscle—this is other than polio also—with heat or hot applications or hot, moist applications, even though they do not show spasm.

The everyday example is the so-called lumbago, pain in the back. Now that may show no spasm at all to the observer, but there is pain there. There is pain there first because there is spasm. It is the pulling of the muscle which is spasm, that produces pain, and that we can treat and we do treat with hot applications even though the observer does not see the spasm.

Q. Yes. Well, all you have to know, first, is where the spasm is either from your own observation or by the information given you by the patient, isn't that right? A. That is right, where the pain is.

Q. Yes. You do not start putting hot packs all over a man on the chance that you may hit a spastic muscle, do you? A. Oh, no, sir.

Q. Certainly. And this Sister Kenny treatment cannot be properly commenced until you have some evidence of a spasm so as to indicate where your treatment should start? A. That is still, I think, a misunderstanding of my explanation.

Q. Well, let us get it straight. Do you mean to say that you can— A. A spasm may not be apparent to the observer. 710

Q. I am not talking about an apparent spasm. I am talking about the existence of a spasm, either as observed or that the patient tells you that he has got. A. Yes.

Q. You put your Sister Kenny method on that spasm, don't you? A. Yes, sir.

Q. You cannot do it until he tells you or you see where the spasm is? A. Yes, that is correct.

Q. And until he has that spasm you cannot use the Sister Kenny method? A. That is correct.

Mr. Gray: Now may I have Dr. Lewin's book, please.

(Book handed by Mr. Rassner to Mr. Gray.) 711

Q. Referring again to page 79 of Dr. Lewin's book on infantile paralysis, in the second extract which you read into the record it says: "in the presence of symptoms, signs and physical observations mentioned."

Will you please read into the record the symptoms, signs and physical observations which are there mentioned. A. (After examining) It is not mentioned on this page. I will have to refer to some other page that he must have referred to.

Q. Well, I do not want to take up the Court's and jury's time. A. The symptoms, signs and physical observations are not on this page here (indicating). At no place on that page are the symptoms mentioned.

Q. Well, there is nothing here in this particular extract which you read into the record which gives you the symptoms, signs and physical observations upon which it is based? A. No, sir.

Q. Now, I am going to read to you some statements, Doctor, and ask you to state whether or not in your opinion they are true: "At present there is no way of preventing infantile paralysis, and it is extremely difficult, if not impossible, to protect children from being exposed to infection." Is that true or not? A. That is true.

713 Mr. Rassner: I object to this form of examination.

The Court: I will let him.

Mr. Rassner: It is quite unusual.

Mr. Gray: It is an unusual case.

The Court: I will take it for that reason.

Mr. Rassner: Very well, I won't press it.

A. The answer is "true".

Q. Now, will you please state whether or not in your opinion this is true: "Probably the greatest source of infection is the large number of human carriers; these
714 may be unrecognized abortive cases of carriers who are apparently healthy. The abortive cases may be only slightly ill for a few days with a fever and upset stomach, yet the virus may be active within them. * * * There is no practical way of discovering who harbors the virus and for how long." A. True.

Q. Will you state whether or not this is true in your opinion: "Flies have been contaminated artificially with virus. However, it has never been proven that human beings actually have contracted the disease through flies and, moreover, outbreaks do occur in districts where, and at times, when there are no flies." Is that true? A. True.

Q. Will you please state whether or not this is true in your opinion: "It is also believed that fatigue may

have something to do with causing a person to be more susceptible to the severer forms of poliomyelitis. If he has over-exercised, causing extreme fatigue, his body may be less likely to check the spread of the attacking agent or disease." Is that true? A. True.

Q. Will you please state whether or not in your opinion this is true: "Likewise, body cleanliness is important. Failure to practice good health habits, such as washing the hands thoroughly before eating or before handling food, may result in transmission of infection." A. True.

Q. Will you state whether or not in your opinion this is true: "Since there is no specific means of warding off 716
the disease, such as medical science has provided for diphtheria, typhoid, smallpox, or any other of the many communicable diseases, prevention for the present depends upon the avoidance of exposure." Is that true? A. Will you please read it again?

(Read by the reporter.) A. Well, we will have to modify that with relation to a previous question. Since there is—I think the question read something like this: Since there was no practical means of detecting who was a carrier, then the last part of that statement would not seem to hold. I mean the answer would appear to be "True", but since we have no practical means of detecting who is a 717
carrier we cannot say that the way of preventing the disease would be to ward off the infection.

Q. To ward off exposure? A. To ward off exposure.

Q. Yes, because you cannot tell when a person is exposed. A. That is true.

Q. Will you please state whether or not in your opinion this is true: "It is to be emphasized that there is no cure for infantile paralysis. All that is done today must be looked upon as preventive of unnecessary complications or restoration to maximum use of impaired or damaged nerves or muscles. This is all that can be hoped for by treatment in any stage of the disease." A. True.

Q. Do you know the work called "Neurology" by Grinker? A. Yes.

Q. Is he a recognized authority? A. Yes, one of the foremost.

Q. I shall read to you extracts from his work—

Mr. Rassner: What page?

Mr. Gray: Page 758—

Q. —and ask you whether you agree with this statement: "The sporadic endemic cases may be precipitated
719 by a lowered resistance of individuals who harbor the virus in their respiratory passages." Do you agree with that? A. That is quite possible.

Q. On page 764, will you state whether or not you agree with this statement: "The poliomyelitis should be diagnosed in the pre-paralytic stage in order to attain the maximum benefit from convalescent serum, but one must know how to diagnose this stage." Do you agree with that? A. Yes, with the exception that convalescent serum has not proved its worth.

Q. It has not been proved practicable? A. That is right.

720 Q. From page 764, will you state whether or not you agree with this statement: "There is little difference between the findings of pre-paralytic poliomyelitis and lymphocytic-meningitis or chorio-meningitis. Many cases of treated pre-paralytic poliomyelitis are reported as cures which never had the disease at all." Do you agree with that? A. I would like to know what would have been the treatment of those patients before I could answer that question.

Q. You cannot answer the question? A. Going back to your question before about the treatment of a muscle which is not obviously afflicted.

Q. You will have to speak louder; I cannot hear you, Doctor. A. I said that would bring us back to your ques-

tion before regarding the treatment of muscles that were not afflicted. In other words, in those statements where the distinction between choriocytic-meningitis and poliomyelitis, that was quite difficult. I would like to know what was the treatment there in the pre-paralytic stage in order to answer your question.

Q. Then you cannot answer the question? A. I cannot answer your question.

Q. Will you please describe what you mean by a stiff joint resulting from poliomyelitis. A. Well, a stiff—

Mr. Rassner: Now, I object to that. Our claim 722
is that the stiff joints in this case are the result not of poliomyelitis but of neglect to treat poliomyelitis.

The Court: Well, regardless of what caused it, it is there, apparently.

Mr. Rassner: Yes, of course it is there, but I object to the question. I do not think it is a fair one.

The Court: Overruled.

Mr. Rassner: We are not claiming that polio caused the stiff joints. We deny that it did. It is the steamship company's failure to treat that caused 723
the stiff joints and not the virus.

The Witness: May I ask a question?

The Court: Yes.

The Witness: Which are the stiff joints in this case?

Q. Well, you testified about stiff joints for Mr. Rassner. What were you talking about then? A. I didn't say that this case showed stiff joints.

Q. Oh, you did not? A. No, sir.

Q. Did you find any stiff joints in this case? A. No, sir. That is why I asked the question—

724 Q. That is all right. A. (Continuing)—which are the stiff joints.

Q. There were no stiff joints in this case, were there? A. No, sir, unless you mean a non-functioning joint.

Q. Well, that is something else, but a stiff joint was not there, was it? A. No, sir.

Q. Have you ever made a spinal tap, Doctor? A. Many yes, sir.

Q. After you get the fluid what do you do to analyze it, to ascertain the presence or absence of conditions that show or eliminate polio? A. During the process of the
725 spinal tap, first of all, we test the pressure of the spinal fluid to determine whether or not it is increased. If it is increased we know that there is something wrong. That is our first step.

The second step is to withdraw a certain amount of spinal fluid for the various tests that we would like to have done to rule in polio or to rule out other similar conditions, and we proceed immediately to test the cellular content, to count the number of cells in that spinal fluid, and that has to be done fairly quickly, otherwise the cells die.

Then a certain amount of the fluid is tested for the
726 amount of protein in the spinal fluid, which if it is elevated gives us an indication that there is something wrong, and depending upon what other conditions we want to rule out, why we ask for other tests. For example, the Wassermann on the spinal fluid, the colloidal gold or the sugar content, or the chloride content.

Q. And the running of these tests would take how long, that is, if you were in a hurry and wanted to do it quickly and still make a perfect job, how long would it take you to do it? A. Well, the cell count would take a matter of minutes, depending upon the technicians available, assuming that they are available.

The chemistry for, let us say, the proteins, the sugar

and the chlorides, which would be more important before the Wassermann, let us say, and the colloidal gold, would take, I would say, anywhere from one hour to 24 hours.

Q. For each test? A. No, for the sum total.

Q. For the sum total. A. Yes. In other words, let us take a test specifically. I am not a laboratory technician, but I have some idea as to how long it takes for them to do the procedure.

The total protein test can be done within the matter of an hour or two, let us say, roughly.

The sugar content has to be treated so that the sugar is made in an available form, a form available for testing, and that usually takes 24 hours. 728

The chloride tests would take a matter of a few hours to do, so that is why I say anywhere from a matter of a few minutes to 24 hours.

Q. Yes. So that it would depend somewhat upon the number of technicians that you have available, so that if each test could be run concurrently, you could do it in 24 hours? A. Yes. I mean even if we had one technician for each test—the sugar test itself would take about 24 hours to run.

Q. I see. Now, I want you to get clear on the record, Doctor, what you mean by an antagonistic muscle. Do you mean the muscle or just tell us what you mean by an antagonistic muscle. A. The muscle which pulls—let us modify that. The muscle whose function is the opposite to that of the agonist, in other words. 729

Q. May I state it this way so that the jury and I will understand it— A. Yes.

Q. —the antagonistic muscle is the compensating muscle for the muscle that is paralyzed? A. No, sir, it is not.

Q. Then what is it? A. It is the muscle whose function is distinctly the opposite of the muscle that is antagonistic. In other words, as I explained before, a biceps muscle flexes the forearm. Its direct antagonist is the triceps

muscle which extends the forearm, so its function is the direct opposite.

Q. Right. Now let us take one muscle as the muscle that is being affected by polio. A. Yes, sir.

Q. And the compensating muscle as the antagonistic muscle; which of those muscles feels the spasm? A. The one that is afflicted feels the spasm first.

Q. I see; and that contracts it? A. That contracts it.

Q. The antagonistic muscle is stretched? A. Is over-stretched.

731 Q. Now where do you put the heating treatment? A. On both of them.

Q. On both of them? A. Yes, sir.

Mr. Gray: I think that is all, Doctor.

Re-direct Examination by Mr. Rassner:

Q. I just have three questions and I have written them down to make it short. Upon Mr. McAllister showing the conditions described as having been present at the time he was confined to his bed on board the vessel, on or about the 24th day of November, 1945, would good practice re-
732 quire that he be treated by a physician or removed to a hospital immediately? A. Absolutely.

Q. And that that failure to do so was bad practice, is that right? A. Yes, sir.

Q. That upon Mr. McAllister's having been given the Kenny method of treatment promptly, all danger of non-functioning joints and muscles would have been eliminated—

Mr. Gray: Objected to.

Q. (Continuing)—with a fair degree of medical certainty, in your opinion, is that right?

Mr. Gray: That is objected to.

733

The Court: Objection sustained as leading.

Mr. Rassner: Well, I thought I would make it short, but it seems I cannot do that.

Q. Assuming that Mr. McAllister had been given the Kenny method of treatment promptly, what if any effect would that have upon the question of sequelae as to non-functioning joints and muscles?

Mr. Gray: That is objected to.

The Court: He has already testified to that. Let him testify again.

734

Mr. Gray: Except that the word "promptly" is there.—

The Court: All right, let him testify.

A. If treatment is instituted promptly, as Dr. Lewin brought out, it is usually a question of minutes, the danger for serious sequalae is alleviated.

Q. Can you state with a reasonable degree of medical certainty whether or not permitting Mr. McAllister to remain in his bed aboard the ship from November 24, 1945, to December 1, 1945, was the competent producing and cause of Mr. McAllister suffering from non-functioning joints and muscles as he does at the present time?

735

Mr. Gray: That is objected to.

The Court: Objection sustained. He has already testified to that. If he wants to add anything to what he has already said, I will let him do so.

Mr. Rassner: All right.

Q. Will you add anything further if you want to, to what you have already said.

The Court: You do not have to use this alleged legal language about competent producing cause either.

736 A. Well, I can only reiterate, possibly in different words, what I have tried to express before, that if the Kenny treatment is instituted very promptly—by that I mean as soon as at least the suspicion of polio is made, if the treatment is instituted promptly it will forestall many, many serious sequalae.

Q. And would the fact that he had a stiff neck and that his body was burning, and that he had difficulty in moving —the other signs which I gave you as having existed on or before the 24th day of November, 1945, be indicative to
737 the average person or having any knowledge of first aid treatment—

Mr. Gray: That is objected to.

Q. (Continued)—that polio was to be suspected?

Mr. Gray: That is objected to as leading.

Q. (Continued) Or was present?

Mr. Gray: Leading, and without any foundation, too.

738 The Court: I will sustain the objection to that question.

Mr. Rassner: That is all.

Recross-Examination by Mr. Gray:

Q. Now, Doctor, when we say "promptly" you mean promptly after the spasms have become evident either visually or upon the complaint of the patient as to the application of the Sister Kenny method? A. No. I think I tried to bring out before that it need not be when the spasms appear. If the patient is paralyzed in the muscles in the early stages, he is paralyzed because he feels pain

and there may not be spasm there to the observer at least; nevertheless treatment should be started at that time.

Q. You mean—A. Because a suspicion at least of polio is made.

Q. You mean the Sister Kenny treatment should be started? A. Yes, sir.

Q. And where should that be started? A. On the muscles that show the obvious weakness or paralysis, or pain.

Q. And until they show paralysis you cannot apply the Sister Kenny method? 740

Mr. Rassner: I object to that.

The Court: Objection sustained.

A. Well, that is true. We just cannot, let us say, pick a normal individual who has no trouble with his muscles and wrap around blankets in the Kenny treatment. He has to have some complaint referable to the muscles to treat the muscles.

Q. Certainly.

Re-direct Examination by Mr. Rassner:

741

Q. May we conclude it this way: Upon Mr. McAlister showing pain in his neck, a feeling of having his entire body burned, how long after that would you consider prompt treatment? A. The moment that he had any symptom or sign referable to a muscle.

Q. How long after those signs? A. It may be a matter of, oh, say, hours.

Re-cross Examination by Mr. Gray:

Q. Are you in a position to say, Dr. DiFiore, that Mr. McAllister's condition today would have been different if

742 *John A. DiFiore—Re-cross.*

he had not been—assuming also that he had no spasm while he was lying in his bunk from the 24th of November, 1945, until the 1st of December, 1945, with no other symptoms than the stiff neck, the feeling of a burning sensation and weakness, can you say now that his condition would have been any different if he had been taken to a hospital? A. I have already—

Mr. Rassner: The objection is—

Mr. Gray: Just a minute.

743 Mr. Rassner: What do you mean "just a minute."

The Court: Objection sustained.

By the Court:

Q. Are you able to state anything with respect to the plaintiff, Mr. McAllister, in so far as the future is concerned, and what if anything can be done for him to improve his condition? A. Yes. I think at this stage of his illness we can state with a reasonable degree of certainty—

Q. Medical certainty. A.—medical certainty—that the improvement, if any—the further improvement from this
744 time on, if any, will be very slight. I am sorry to say that.

Q. Well, as I understand it then, from your experience with cases of this kind, you do not hold out a great deal of hope for any improvement in his condition. He may get some, but he has reached about the maximum— A. That is right.

Q. —of his improvement? A. From our observations at the end of one year. Now that is an arbitrary figure of time but it works out in practice. Beyond the period of one year, after the onset of the illness, there is very little appreciable recovery, if any, in any case.

745

By Mr. Rassner:

Q. That is excluding surgery, of course? A. Yes.

Q. Not taking into account surgery. A. Surgery to straighten out the foot —

The Court: You mean—

Mr. Rassner: I am not trying to qualify this witness as a surgeon, but what we have in mind is that Dr. DiFiore never had a case as bad as this where, in so far as he always had the Kenny treatment available.

746

Now I expect to bring specialists here who have had cases where the Kenny treatment—

The Court: Well, we will take a recess now until 2.15.

Mr. Rassner: Well, I am through with this witness so far as I am concerned.

Mr. Gray: I am through with him, too.

The Court: All right, Doctor.

(Witness excused.)

(Recess to 2.15 p.m.)

747

AFTERNOON SESSION—2.15 P.M.

ROBERT A. MCALLISTER, resumed the stand.

Cross Examination Continued by Mr. McAllister:

Mr. Rassner: I would like to address a motion to the Court. In view of the fact that counsel for the respective parties hereto have stipulated that the plaintiff would withdraw his charge of negligence against the steamship company on the grounds alleged in the complaint, that the steamship company required him to work after he reported ill, and in

748 *Robert A. McAllister—Cross.*

view of the fact that we admitted that he wasn't required to work after he reported ill, I move that all the testimony with reference to the entries as to when he was on watch after he reported ill be stricken from the record and that you advise the jury to disregard it.

Mr. Gray: The purpose of the evidence was—

The Court: Motion denied.

Mr. Rassner: Exception, please.

749 Q. Referring again to this Exhibit D, Mr. McAllister, and to those notations in your handwriting as to temperatures, pressures and so forth, where did you get the data from which you put those figures down? From indicators in the engine room? A. That is where it would be, yes.

Q. From indicators in the engine room? A. Yes.

Q. Indicators of temperature? A. Temperature.

Q. And indicators of pressures on the various pieces of machinery? A. That is where those gauges are which would register those temperatures.

Q. That is where you got those figures? A. That is where I was told they came from. I imagine that they would come from there. If I were down there I would
750 enter my pressures right in here.

Q. Didn't you take those from the gauges yourself?

Mr. Rassner: Doesn't Mr. Gray understand English? He had been told—

Mr. Gray: Please don't interrupt when I am cross examining the witness.

Mr. Rassner: When you are on the bench I will take orders from you. Now I will take them from the Court.

The Court: I will let him answer.

The Witness: You want to know if I took these particular temperatures?

Q. Yes. A. No, I didn't take these particular pressures.

Q. You didn't take them from the gauges yourself? A. No.

Q. Where did you get this various data that you did put down?

Mr. Rassner: I object to it as already answered.

The Court: Overruled.

A. That data was given to me along with everything else that I entered in the logbook at these particular times.

Q. Have you discussed this case with Mr. Rassner during 752
lunch hour today? A. I stayed in this building during lunch hour today. I didn't go out.

Q. Did you discuss this case with Mr. Rassner during lunch hour today? A. About this, you mean?

Q. No, I am not asking you what you spoke to him about. Did you discuss anything with him during the lunch hour today? A. No.

Q. You haven't talked to Mr. Rassner during lunch hour? A. Will you let me explain?

Q. Just answer yes or no. A. I did talk to him, yes.

Q. As I recollect your testimony—

753

Mr. Rassner: Am I to understand from that that Mr. Gray infers that I advised the witness about the case?

Mr. Gray: I am not inferring anything.

Mr. Rassner: I think it is unfair and it carries with it a nasty insinuation.

The Court: I don't think there is any insinuation at all. I think the jury understands perfectly well that you talk to the plaintiff during the lunch hour.

Mr. Rassner: Certainly, but not that I discussed the case or mentioned it to him.

The Court: You talked to him prior to the trial.

Mr. Rassner: Oh, I discussed the case with him

754 *Robert A. McAllister—Cross.*

before, but it just so happens, and the record might as well show it, that when Mr. McAllister started to talk to me, I said, "I am hungry and I am going to lunch. Good-bye."

The Witness: That is correct.

Mr. Rassner: We might as well have the entire conversation.

Q. Have you talked to Mr. Brodowski or Mr. Dembow?

Mr. Rassner: I object to it as incompetent, irrele-
755 vant and immaterial. It has nothing to do with the case.

The Court: I will let him cross examine.

Q. Have you talked to Mr. Brodowski or Mr. Dembow since you have been on the witness stand this morning? A. Since I have been on the witness stand this morning? I haven't spoken to Mr. Brodowski.

Q. Did you talk to Mr. Dembow? A. At the lunch hour, yes.

Q. As I recollect your testimony, and I would like to have you correct me if I am wrong, you said that some of
756 the other engineer officers brought the log up to you to sign. Is that what you said? A. That is correct.

Q. You didn't say that they brought you up the logbook for you to fill in a lot of data and sign it —

Mr. Rassner: I object to the form of the question.

The Court: Objection sustained.

Q. In your previous testimony you made no reference to any data which you entered in this logbook?

Mr. Rassner: I thought your Honor sustained that objection. A. I wasn't asked that.

The Court: He wasn't asked that. That is an answer.

Q. Now, you say all this data was given to you by the engineers on watch?

Mr. Rassner: I object to the form of the question. It is an insinuation in the meantime. The form is objected to as improper. Mr. Gray ought to know better.

The Court: Objection sustained.

Q. Where did you get the information that you have entered here in your own handwriting?

The Court: He has already said, as I understand 758
it, that the officer who brought it up to him for signature gave him that information. Isn't that so?

The Witness: That is correct, your Honor.

Q. And then you entered it in the logbook yourself in your own handwriting?

Mr. Rassner: I object to it as already answered.

The Court: I will let him answer it. He said already it is in his handwriting.

The Witness: Yes.

Q. Now then, we had reached the point in your testi- 759
mony before Dr. DiFiore was put on the stand of the symptoms which you had felt up until the time you took to your bunk, permanently, and as I recollect it you had trouble with your vision, then you had these dizzy spells. Now, what was the next symptom you felt? A. I felt a stiff neck and a hardness in swallowing.

Q. And that was about when, the 21st of November? A. Approximately around the 21st. I don't recall the exact date.

Q. Then what were the next symptoms you felt? A. Practically immediately I had a paralysis of the face. I couldn't bite at all.

Q. And this was about what date? A. Approximately around the same time, almost after the stiff neck; it almost came on immediately with it; a matter of hours, I might say.

Q. Was this before or after you went to bed, you went to your bunk for good? A. This was—that was after I went to the bunk.

Q. How long after you had gone to your bunk for good did you have this stiff neck and paralysis of your jaw? A. That stayed with me then on up to a couple—through the hospitals. Then eventually, gradually it started to 761 come back—the movement of my face and jaw.

Q. When did it start to come back with respect to the time you went ashore on December 1st? A. That is what I am trying to think of. The ship that was bringing me home from Guam—

Q. The hospital ship? A. No, it wasn't a hospital ship. As I recall they called it, A. P. A. ship it was. They were taking hospitalized cases from Guam, I think, but I don't know if it was particularly a hospital ship—that ship.

Q. It was on that ship that the trouble with your jaw started to return?

762 Mr. Rassner: Started to leave.

A. No, started to leave.

Q. I thought you said that a minute back. A. No. I had it during that period and it started to relax a little. So I could start moving my teeth for the consumption of a little bit of food.

Q. How did you eat on board the hospital ship Repose? A. Oh, aboard the hospital ship Repose they gave me a lot of liquid. What they particularly did was grind up my diet as much as they could, and they had someone to feed it to me to see if I could get down that much nourishment.

Q. But you couldn't chew it then? A. No, I couldn't.

Q. What did they give you at the Marine Corps Hospital? A. At Tsingtao?

Q. Yes. A. They put a needle in my arm and glucose. They were giving me that.

Q. Well, did you eat anything at Tsingtao at the Marine Hospital? A. No, I didn't eat anything there.

Q. Now then did you have any further symptoms after you had trouble with your jaw? A. Well, I had developed—I don't believe I stated to you—I had that burning sensation. I had a burning sensation and involuntary movements of the muscles. 764

Q. When did the burning sensation start with respect to the time you went to bed permanently? A. I had that just about before the ship—not in intensity—but I had it before the ship left Shanghai.

Q. That was before the 21st of November? A. I don't know if it left that day. Yes, I had that burning sensation then.

Q. Where did the burning sensation first occur? That is, where on your body? A. Well, on my body—the way I first got it was with the stiff neck a little bit, like burns, a burning sensation. That is when I first got it.

Q. And from your neck where did it go? A. Well, after a while it kept on then coming down in the body, as if I 765 had a high fever. Just burning like that every place, but it evidently didn't touch my right arm. I didn't feel anything there.

Q. This sensation you had was a sensation of a high fever? A. Well, that is the way I tried to explain it to you, but I was like burning up, a burning up effect. That is the way it struck me.

Q. Did anyone take your temperature at that time? A. Yes, my temperature was taken at that time.

Q. And where was it taken? A. It was taken aboard ship. I believe it was taken on the day that the medical report was made out, but I don't know if it was made out

that day. I saw the purser and he did take my temperature, and at that particular time, I believe, if I recall rightly, there wasn't a temperature.

Q. That is, you had no body temperature? A. But I had a burning sensation, you see.

By the Court:

Q. When did you say the purser first took your temperature? A. I remember this one day I was in—I had this burning sensation and I started complaining particu-
767 larly about it, because I thought it was going to develop into a very high fever. Then the temperature was taken and it didn't indicate a high fever.

Q. This states here that the vessel left Shanghai on the 23rd of November. A. That was the day in between, the 24th.

Q. The 24th was when the temperature was taken? A. Yes, I believe that is when I got a thermometer into my mouth.

Q. Is that the first time you had your temperature taken? A. I believe it was, your Honor. Yes.

Q. Did you say at that time there was no temperature
768 or that is what he told you? A. That is what I believe. He said I didn't have any temperature, but I remember I felt a little self-conscious; feeling myself burning up and no temperature.

By Mr. Gray:

Q. Now, how long in point of time, that is in hours or days, did it take for this burning sensation you have described to go from the back of your neck down into your leg? Did it go quickly or was it a gradual movement? A. It was gradual. All gradual, I mean. As a matter of fact, it kept on and seemed to be moving along. I didn't know I was going to get—

Q. Had it reached your feet by the time you left Swettenham on December 1? A. Oh, yes. It reached my feet previous. At that time when I had my temperature taken I did have a burning sensation right down to my feet.

Q. As a matter of fact then during the time you were on board the vessel you had no body temperature above normal?

Mr. Rassner: That is objected to. That is not what he said.

Mr. Gray: I want to find out.

Mr. Rassner: He was told when somebody— 770

The Court: He says he knows.

Mr. Rassner: There is no proof that he ever saw the thermometer.

Mr. Gray: I object to Mr. Rassner's coaching the witness.

The Court: I will let him testify to what he knows. If he doesn't know, he can say so.

The Witness: What was that question?

Q. During the time you were on the vessel before you left to go ashore on December 1, did you have any body temperature that showed on the clinical thermometer? A. As I say, I thought I did. I thought I had a temperature. 771

Q. But when the pharmacist's mate took your temperature under your tongue, did he not, with the clinical thermometer? A. That is right.

Q. During the time you were on board did he tell you you had any temperature above normal?

Mr. Rassner: That is objected to as hearsay.

The Court: I will let him answer.

A. At any time while I was on board? Well, that was the only time—

The Court: December 1.

The Witness: Yes. As I understand, that was the only time that my temperature was taken.

Q. It was just taken once? A. Yes.

Q. That was about the 24th? A. That is right.

Q. Was your temperature taken after you got ashore at the Marine Corps Hospital? A. Well, I felt they gave me a pretty thorough examination.

Q. Did anyone tell you there what your body temperature was? A. They never told me anything there.

Mr. Rassner: I object.

Mr. Gray: He says no.

Mr. Rassner: If the Court please, may I ask the Court to inform Mr. McAllister that when I get up to please wait until your Honor has ruled?

The Witness: I am sorry, Mr. Rassner.

The Court: I so instruct him.

Mr. Gray: Now, have you some suggestion?

Mr. Rassner: No. I withdraw it.

Q. Now, then up to the 1st of December, 1945, have you told us all of the symptoms that you experienced? A. Well, I neglected to say that I had spasm. I got spasm then later on.

Q. When you say "later on," that is later than what? A. Well, that was about a couple of days before I was taken off the ship.

Q. Off the ship? A. Yes.

Q. You started to have spasms? A. That is right.

Q. Where did you have those spasms? A. In the arm and the legs, like a jumping of the muscles in the arm and the legs.

Q. Both arms or one arm? A. One arm. The arm and legs.

Q. Which arm was that? A. The left arm.

Q. Also in your both legs? A. That is right.

Q. About two days before you left the ship? A. That is correct.

Q. Did you say anything of that to Mr. Napier, the pharmacist's mate? A. They knew I was ill—

Q. No. Did you tell him about it before you left the ship? A. I don't believe I had occasion to.

Q. You don't believe you had occasion to? A. I mean I never particularly saw him. I was pretty ill and they came in and asked me and I gave them all the data. 776

Q. What is your present recollection as to whether or not you told Mr. Napier about having spasms before you left the ship? A. Whether I remember telling him or not?

Q. Yes. A. I don't remember if I did tell him or not.

Q. Now, I show you a set of shipping articles. This is the original of Exhibit A. I ask you if that is your signature on line 20? A. I believe it is, Mr. Gray. That is my signature.

Q. And at the time you put your signature there, did you see this stamp at the top of the column reading that you are being employed by the United States? A. I did not.

Q. Now, do you mean to say you did not or you don't remember now whether you did or not? A. I did not. I think I would recall that. 777

Q. You think you would recall that? A. If I had seen it.

Q. Now, then, did you have any other contract of employment on this ship other than these articles?

Mr. Rassner: That is asking for a legal conclusion, your Honor. I object to it.

The Court: He doesn't assert that he had any. You don't assert that he had any, do you?

Mr. Gray: No, sir, but I want to make sure

that this is the only contract we are going to discuss in the case.

The Court: Well, I will assume that is the only one.

Q. Now, when did you first receive any treatment known as the Sister Kenny treatment? A. When did I first receive that treatment?

Q. Yes. A. I first received that treatment in the San Francisco Marine Hospital, California.

Q. You didn't receive any on the hospital ship Repose? A. No, I did not.

Q. You didn't receive any such treatment at the Marine Corps Hospital at Tsingtao? A. No, sir, I did not.

Q. You didn't receive any of that treatment on the ship that took you from Guam to San Francisco? A. No, sir, I did not.

Q. When did you say that your muscle spasms stopped? A. Well, I believe I felt most of them when I couldn't see the involuntary twitching of the muscles, and it was on the Repose, I think.

Q. On the Repose? A. On the Repose, that is right.

Q. Your muscles stopped twitching on the Repose? A. They stopped jumping. There was a wavering but at that time the paralysis had set in and I didn't particularly notice. I just noticed my left foot was shaking. It wasn't that spasmodic jump.

Q. How about your left arm? Did you have any muscle spasm in it then on the Repose? A. I don't recall particularly. I remember the legs, though. I noticed it was very stiff, more or less, on the left arm. I couldn't do much with it.

Q. I am talking now just about the spasm. A. I understand, but I am trying to say I couldn't recall that particular jumping anymore. It was just like a pain was there.

Q. You do recollect, you say, that you had some spasm in your left arm before you left the ship? A. Yes, I had a little bit of spasm in my left arm.

Q. Did you have any spasm in your left arm when you got to the Marine Corps Hospital at Tsingtao? A. Yes, I still had it there, too—

Q. Now, just answer the question. A. I did. I am sorry. I did have it there.

Q. And from there you went to the Repose at Shanghai? A. Yes. They sent me from there to the Repose.

Q. You don't remember now whether you had any more spasm in your left arm on the Repose or not? A. No. I couldn't particularly state whether I did or not.

Q. Did you have any muscle spasm in your left arm 782
when you got to San Francisco? A. I couldn't particularly state whether I did or not there. All I remember distinctly was after when the muscle—I didn't understand what it was all going to develop into—was the fact that I couldn't move my arm.

Q. Now, when you say "spasm", you had pain, didn't you? A. Well, in that case I must have had spasm all the time because I was judging my spasm by the fact that—

Q. Just answer the question and we will get along faster. When you had spasm you had pain? A. I had pain at all times.

Q. Did you have spasm at all times? A. I don't be- 783
lieve so. I didn't think I had spasm at all. It would twitch and all of a sudden I would have a spasm.

Q. When did your arm stop twitching? A. I would say on board the Repose.

Q. You left the Repose about the 17th of December, did you not? A. I guess that is correct.

Mr. Rassner: I have the exact date. December 18th.

Q. Now, when you got to the hospital in San Francisco were did they give you the Sister Kenny treatment on your body? A. They gave it to me on my arm.

Q. Your left arm? A. My left arm and on my neck and across under here.

Q. On your left side? A. Over here and then put some on my right arm just in case. They thought it would go over there. And my entire—from my waist down.

Q. And your legs? A. That is correct.

Q. How long in point of time did they continue to give you that treatment? A. All the time I stayed in the hospital. Up to the time I left they continued that treatment.

Q. And you left the hospital in San Francisco about when? Sometime in April, was it? A. I imagine that. April or May, I guess.

Mr. Gray: May we have the exact date, Mr. Rassner?

(Mr. Rassner hands a paper to Mr. Gray.)

Q. According to Exhibit 6 you were in the hospital, in San Francisco Hospital, from January 17, 1946, to April 19, 1946. During that time did you have Sister Kenny treatment throughout? A. That is correct.

Q. Did you feel any better after you had finished the treatment at San Francisco Hospital? A. Yes, I did.

Q. Did you have any better use of your left arm? A. Yes, I did.

Q. Than when you entered? A. I must have, yes.

Q. And you had better use of your legs, or did you have more feeling in your legs? A. I did, yes, sir.

Q. And from the hospital in San Francisco you were flown to the Marine Hospital at Staten Island? A. That is correct, sir.

Q. And how long did you stay in the hospital at Staten Island? A. (No answer.)

(Mr. Rassner hands a paper to Mr. Gray.)

Mr. Gray: I offer in evidence the abstract of the clinical record.

Mr. Rassner: That is already in. I gave you that for your convenience.

Q. According to the clinical abstract of the Marine Hospital at Staten Island, Exhibit 7, you had hospital care there from April 21, 1946, to May 9, 1946. That was about between two and three weeks, is that correct? A. Approximately, Mr. Gray.

Q. When you were there what kind of treatment did they give you? A. They gave me a sun lamp on my legs and massage approximately a half an hour or three-quarters of an hour a day. 788

Q. Did they give you any Sister Kenny treatment there? A. They didn't have the facilities to do so.

Q. No. I asked you if they gave it to you? A. No, they didn't give me any of that.

Q. This electric lamp treatment that was given to you: was that infra-red or ultra-violet, do you know? A. I couldn't tell you, Mr. Gray.

Q. Was it a heat lamp or a lamp that would sunburn you? A. Oh, it was a heat lamp.

Q. And from the time you left the hospital at Staten Island, what did you have in the way of treatment? A. Well, before I left the hospital in Staten Island I contacted the Polio Foundation. 789

Q. That is, the National Foundation for Infantile Paralysis? A. That is correct, Mr. Gray.

Q. The March of Dimes outfit? A. Correct. I contacted them from the Marine Hospital in Staten Island, and I told them how my case was, and they told me, Well, if I could be discharged from the Marine Hospital in Staten Island and go home that they would have Dr. Dever of Bellevue Hospital take me in there for further treatment and rehabilitation.

Q. And that is what you did? A. And that is what I did, sir.

Q. Did you become an in-patient at Bellevue Hospital? A. I beg your pardon, sir?

Q. Did you become an in-patient at Bellevue Hospital? A. That is right, yes, sir.

Q. And how long were you there? A. I stayed there long enough for them to fit me for braces and show me a few tricks and then they sent me home and sent a nurse to visit me, a visiting nurse to continue with these treatments.

Q. And do you still take treatments from the visiting nurse? A. No, I haven't.

Q. When did she stop coming? A. The end of 1946.

Q. The end of 1946? A. That is right, sir.

Q. So that during the years 1946 and 1947 and up to now in 1948 you have had no treatments for your malady? A. Oh, I have had, sir.

Q. You have had? A. Yes, sir.

Q. Where did you get that treatment? A. The Institute for the Crippled and Disabled at 400 First Avenue, under Dr. Dever's direction.

Q. Was that also under the general supervision of the National Foundation? A. Yes, sir.

Q. So the National Foundation has been looking after your interests ever since you left the Marine Hospital at Staten Island? A. That is right, sir, in regards to my condition they have.

Q. When you were at Bellevue what kind of treatment did they give you? A. Hot baths and Sister Kenny packs.

Q. And those Sister Kenny treatments continued while you were in Bellevue? A. That is right, sir.

Q. I don't remember whether you said when you left Bellevue—do you remember? A. When I left Bellevue?

Mr. Rassner: I think we can give it to you exactly (examining). July 12th.

Mr. Gray: What year?

Mr. Rassner: 1946.

Q. Is that fairly close as your recollection serves you? A. That is right.

Q. In July, 1946, you left Bellevue? A. That is correct.

Q. And then the treatment by the visiting nurse continued for the rest of that year at your home? A. That is correct.

Q. What type of treatment are you getting at the Hospital for Ruptured and Crippled—or vice versa? A. I was getting rehabilitation treatment. I was a out-patient at that time.

Q. By "rehabilitation" you mean to use your bodily functions that you have left? A. That is right, sir. 794

Q. To use your hands? A. And my legs.

Q. And to learn to walk? A. That is right, sir.

Q. Is there a job or a duty known as that of a night engineer when a vessel is laying at anchor in a harbor? A. Yes, sir, there is.

Q. And did you act as night engineer on the Haines on the night of November 30, 1945? A. No, sir, I didn't.

Q. Now when a night engineer is on duty and a vessel is lying at anchor, what are his duties? A. While it is lying at anchor?

Q. Yes. A. Well, a night engineer, he more or less takes care of the duties of all engineers. He takes care of 795 the duties of all engineers to see—he is responsible for everything. In other words, that different engineers are responsible for when he is on there.

Q. He is the responsible officer in the engine room on the night of that duty? A. That is correct.

Q. And he has a duty from 5 o'clock in the afternoon? A. That is correct, to 8 o'clock.

Q. Until what time in the morning? A. 8 o'clock the following morning.

Q. And that makes him—that gives him 15 hours a day? A. That is correct.

796 *Robert A. McAllister—Cross.*

Q. And he gets overtime pay for it, doesn't he? A. That is correct, sir.

Q. Now, is it customary at times for the night engineer to stand his trick in his own quarters as long as he remains dressed? A. That is right. He is allowed to drop into his own quarters if he prefers.

Q. And if no emergency arises there is nothing for him to do? A. That is right, outside of checking up periodically to see that everything is running smoothly.

797 Mr. Rassner: If your Honor please, we have withdrawn the claim that this steamship company made the man stand any watches after he reported ill. I object to the question on the ground that it is incompetent, irrelevant and immaterial.

The Court: What is the purpose of it? It hasn't anything to do with this case.

Mr. Rassner: No. We are not charging them with any fault in this respect.

The Court: The night engineer's watch was from 5 p.m. until what time?

Mr. Gray: 8 o'clock in the morning.

The Court: All right.

798

Q. You were the second engineer on board the Haines, were you not? A. That is correct.

Q. Now I show you a page in book No. 2 of the engineer's logbook, the smooth log, of the Edward B. Haines for that date, for November 29th to 30, 1945, and ask you if you recognize the handwriting on that page (handing to witness)?

Mr. Rassner: That is objected to as incompetent, irrelevant and immaterial, in view of the form of the pleadings as they stand now.

The Court: I will let him answer.

A. Do I recognize the handwriting?

Q. Yes. A. It is not mine.

Q. No. Do you recognize whose it is? A. I imagine it must be the chief engineer's. I never knew his handwriting.

Q. You never knew the chief's handwriting? A. No, sir.

Mr. Gray: I ask that this be marked for identification, this log.

(Marked Defendant's Exhibit E for identification.)

Q. Now, when a night engineer stands watch when the 800
vessel is at anchor or moored, does he have any assistants in the engineroom as a matter of practice?

Mr. Rassner: If the Court please, I object to it on the ground that it is incompetent, irrelevant and immaterial.

The Court: What was the question?

(Question read.)

The Court: What are you trying to show by that? I mean, what is it that you are driving at?

Mr. Gray: Well, there is an entry here—

The Court: I am commencing to wonder myself. 801

Mr. Gray: There is an indication in one of these logbooks—well, I would rather tell it to your Honor. I do not want the jury to see it.

Mr. Rassner: I have no objection.

The Court: No secrets from this jury.

Mr. Gray: Well, there is an entry in this logbook which has just been marked for identification that the second engineer stood the night watch from 5 o'clock of November 29th to 8 o'clock, 8 a.m., the following morning, and I just want to make sure—

The Court: Well, he said he did not stand the watch. That is what he has testified to.

802 Mr. Gray: He says that he did not.

The Court: Yes.

Mr. Gray: This is still cross-examination and I may be able to prove it by someone else.

The Court: If you have anything to prove it, or anything in his handwriting, or anything to the contrary, let us have it.

Mr. Rassner: May I ask now, does Mr. Gray—

The Court: It is the same old question.

Mr. Rassner: If the Court please, I don't believe
803 they can take an inconsistent stand. Either they admit they ordered the man to report to work after he reported ill or he was not ordered to report to work after he reported ill, but not to jockey from one position to the next every couple of minutes. Now let Mr. Gray state his position.

Mr. Gray: My position is that I do not think the man was so ill that he couldn't work, and that he worked as a matter of course—

Mr. Rassner: There is Mr. Gray jockeying. Is the defendant taking the position that he did not work after he reported ill or he did?

804 Mr. Gray: He did work after he reported ill, and he wasn't too ill to work.

Mr. Rassner: And that he did work?

Mr. Gray: And that he did work, yes.

Mr. Rassner: After he reported to the chief engineer?

Mr. Gray: Exactly. That is what we say.

Mr. Rassner: All right.

Mr. Gray: And we say that is what the records show.

Mr. Rassner: No, never mind what the record shows. Is that the defendant's position?

Mr. Gray: That is the defendant's position.

The Court: All right, let us get the question. We are pretty through with this witness. He is getting a little tired.

Q. Now the question is whether during a night watch, when a vessel is moored or at anchor, whether the night engineer has help in the engine room? A. Yes, he has a fireman and a water tender on watch.

Q. On duty? A. That is correct.

Q. And the fireman and water tender reports to the responsible officer, the officer on watch, if anything requires reporting, doesn't he? A. That is correct.

The Court: As a matter of fact, they are not always there, are they, the fireman and the water tender?

Mr. Gray: No, the fireman and water tender is one man. It is a dual personality.

The Court: Oh, it is one?

The Witness: And there is also an oiler on watch.

The Court: What was this, a coal-burner, this ship?

The Witness: It is an oil-burner, your Honor.

The Court: Oil-burner?

The Witness: Yes, your Honor.

Q. Now do you know Mr. Randell of Cosmopolitan Shipping Company, Inc.? A. Yes, I heard of Mr. Randell. I think I met him personally, too.

Q. You have met him at the office, haven't you, when you called? A. That is correct, I met him.

Q. And did Mr. Randell assist you whenever you asked for assistance in connection with your illness? A. Well, it wasn't directly—

Mr. Rassner: Well, that—

A. —through Mr. Randell.

Mr. Rassner: Do you mind?

The Witness: I am sorry, Mr. Rassner.

Mr. Rassner: I object to the form of the question. It is asking for a conclusion.

The Court: I will let him answer; it is quicker that way.

The Witness: Will you repeat that, please?

Mr. Gray: The reporter will read the question.

(Question read.)

A. Well, that assistance was given to me through the efforts of the union official in San Francisco, California,—up until that moment I didn't—the company, I understand,—

Mr. Gray: I object to what you understand.

Q. What did you know? A. Well, here is what I do know. I know that they asked for the last allotment check back from my wife that was sent to her, and I wrote the company a fairly antagonistic letter about it. I felt there was money coming to me and they could allow that allotment check to go, but after that relations were very smooth. Mr. Randell came specially, and he did advance me money from time to time, and when the ship would come back I would be paid off on that basis.

Q. Well, didn't you receive through the Cosmopolitan Shipping Co., Inc., a total of $2,179.83 for your pay? A. If that is your exact figures, and you have the signature, I imagine I did get it.

The Court: Why don't you get together with Mr. Rassner and agree on these figures?

Mr. Rassner: I have no objection to that.

The Court: Get up a statement as to how much his compensation was per annum, per month or per day.

Mr. Rassner: I have no objection to the payroll record going into evidence. That is the best evidence.

Q. You have been paid right up to the end of the voyage of the vessel, have you not? A. That is correct, Mr. Gray.

Q. And whenever you make allotments to your wife they are paid to your wife and deducted from your pay, aren't they? A. That is correct, Mr. Gray. 812

Q. So that if they asked for a return of an allotment check it was because you were fully paid, was it not? A. No, I wasn't fully paid.

Mr. Rassner: I object to that.

A. I wasn't paid bonuses and other things, which was never usually paid until the end of the trip, I am pretty sure.

Q. But you have been paid now? A. Yes, I have been paid now. I have been paid in full now.

813

The Court: You have been fully paid your wages, including any bonuses and overtime to the end of the voyage, is that so?

The Witness: As we stand today, that is correct.

The Court: You make no complaint on that score?

The Witness: No, sir, I never did.

Q. Then after you got to New York you saw Mr. Randell, did you not? A. What do you mean, after I got to New York? Immediately?

Q. No, after you arrived here in New York didn't you

go to the office of the Cosmopolitan Shipping Co., Inc. and see the claims man? A. No.

Q. Well, first let us get down to this: Did you go to the offices of Cosmopolitan Shipping Co. after you had arrived back in New York, and before today's date? A. That is correct, I did.

Q. And did you see Mr. Randell? A. That is right, I did.

Q. Did you ask Mr. Randell for money from time to time because of—to carry you on for your living expenses? A. At that time when I went down to the office, Mr. Gray, I went down there for the final payoff of all the moneys coming to me. Before that day I contacted Mr. Randell by letter. Mr. Randell was kind enough to consent to advance me that money and I appreciated it then as I appreciate it now. He figured the money was coming to me so he cooperated fully on that score, and that was perfectly all right.

Q. And he gave you—he made advances to you even after you brought this suit, didn't he? A. Well, the last letter, I recall, from Mr. Randell, stated that from now on all business between him and I would be directed through an attorney.

Q. That was after you brought suit, wasn't it? A. Well, yes. I never had no contact—yes, that is right.

Q. Is that your handwriting and your signature on that letter (handing witness)? A. That is true, Mr. Gray.

Q. And that is the letter you wrote to Mr. Randell, is it not? A. Yes, that is right. I did write that to Mr. Randell.

Mr. Gray: I ask to have it marked.

Mr. Rassner: May I see it?

(Handed by Mr. Gray to Mr. Rassner.)

Mr. Rassner: It would be a nice compliment to Mr. Randell, and I won't keep it out, but I do not think it has any value. No objection.

(Marked Defendant's Exhibit F.)

Mr. Rassner: May we have it read to the jury?

Mr. Gray: That is just what I was going to do, Mr. Rassner.

Ladies and gentlemen of the jury, this is dated July 18, 1946 (reading exhibit to the jury).

I have about finished, your Honor. I would like to check up on my notes (examining).

The Court: Do you have any more questions that you want to ask, Mr. Rassner?

Mr. Rassner: None at all, your Honor.

818

By Mr. Gray:

Q. Now then, if you had spasms for a couple of days before you left the ship to go over to the Marine Corps Hospital and had been at the Marine Corps Hospital, did you have spasms when you were walking on deck and going ashore?

Mr. Rassner: I think we have been all over this, your Honor. In fairness to the witness I think he has been exhausted and I do not believe it is fair to put him through the strain.

The Court: You are probably putting it mildly. 819

The Witness: Thank you, your Honor.

The Court: You have covered that.

Mr. Gray: Well, if it is covered,—I just wanted to make sure that it was.

No more questions.

The Court: All right.

(Witness excused.)

The Court: We will take a recess for a few minutes.

(Short recess.)

Mr. Rassner: Mr. Brodowski, will you take the stand, please.

JOHN BRODOWSKI, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Rassner:

Q. Mr. Brodowski, where were you born? A. Bayonne, New Jersey.

Q. When were you born? A. February 8th, 1921.

Q. What is your job? A. Right now?

Q. What are you, a seaman? A. I was a seaman.

Q. What do you do now? A. Welder.

Q. Where? A. In Philadelphia.

Q. How long have you been a seaman? A. Oh, I have three years solid sea time.

Q. When did you start going to sea? A. Oh, I think it was in December, 1943.

Q. How far did you go to school? A. I finished the Bayonne Vocational High School and I took a year of cabinet making also at the same school, at night.

Q. Now, getting down to Mr. McAllister, did you ever know him before you joined the Haines? A. No, sir.

Q. Is that the first time you met him? A. Yes, sir.

Q. Were you friendly with him? Did you associate with him or go out with him? A. No.

Q. Did you have anything to do with him at all? A. No, he was an officer.

Q. Is that good or bad? What does that mean? A. Aboard ship, well, if we are down in the engine room we had to work together, that's all, and outside of that, when we were above deck, he was above and I was down below.

Q. You did not like Mr. McAllister? A. Well, at first he was O. K. but we have had quite a few battles there down below, there is no doubt about that.

Q. You are here under subpoena, aren't you? A. That is right.

Q. In any event, tell us the first time you had any dispute with Mr. McAllister.

Mr. Gray: I think that is immaterial and irrelevant, unless he wants to cross examine him for some reason.

The Court: Well, if it won't take too long.

Mr. Rassner: No, I will be through with this witness within ten minutes, with time out for interruptions.

A. Well, we were O. K. until we hit Shanghai together, but then going down to Hong Kong and coming back from Hong Kong we had quite a bit of trouble together, I mean as working men. 824

Q. Tell us what you observed and what caused this discussion, or trouble, as you call it? A. Well, first of all he started pushing all the work on me that he ordinarily used to do before that.

Q. For how long a period of time had he been working before he started pushing it on you? Was it throughout the voyage? A. Well, throughout the voyage he was O. K., I say, until he hit Shanghai.

Q. Go ahead, tell us about that. A. He worked himself like a regular man did work. He did not try to make anybody else do his work, but, as I say, after we hit Shanghai, going up to Hong Kong, then he started getting ornery. 825

Q. What do you mean by "getting ornery"? A. Well, I had to do a lot of his work.

Q. All right. What happened, if anything, on the way up or back from Shanghai to Hong Kong? A. Pardon me?

Q. What happened then? A. In what respect?

Q. You told us you had some difficulty with him. A. Oh, yes. Well, as I say, I was doing his work. Well, he is supposed to change the tanks over once in a while, when they run low. He told me to change them. He is supposed to change toweling and hot well and stuff like that.

The Court: What was your job on this vessel?

The Witness: Fireman and water tender.

The Court: You were in the engine room?
The Witness: That is right.
The Court: You were under him?
The Witness: That is right.
The Court: All right.

Q. Did you have a discussion with him? A. Yes, a few times.

Q. Where was the ship when you had a discussion with him? A. Well, the first time was out at sea. That was coming back from Hong Kong.

327 Q. From Hong Kong to Shanghai? A. Yes.

Q. Was that the last time you went to Shanghai—or I withdraw that question. A. That is right.

Q. You went up to Hong Kong and on the way back from Hong Kong to Shanghai, that is when you had your trouble? A. The last time.

Q. That is when you had your trouble? A. That is right.

Q. What was the nature of your difficulty? What did he say to you and what did you say to him?

328 Mr. Gray: I do not see the purpose of this, your Honor. Let us find out what it is.

The Court: I do not know. I will take it for what it is worth.

Mr. Rassner: I said I would be through in ten minutes if I did not get an interruption.

A. I would like to have the question repeated.

Q. Just tell us about the incident. A. Well, ordinarily—I mean, I just watch the boilers, the water, watch my burners and clean out the strainers and things of that nature; just tending to the boilers alone. Outside of the boiler room I am not supposed to do anything else, but, like I say, Mr. McAllister, at that time he started telling me to "change the toweling in the hot-well." Well, I can't

watch water and very well do that either, you know, so I squawked about it a little bit.

Q. To whom did you squawk about it a little bit? A. Well, I told him off personally, then I told the first.

Q. Who was the first? What was his name? A. Oh, I don't know. They called him—Mr. Bullis.

Q. Is he the man who is here—Mr. Bullis? A. That is right.

Q. And you filed a complaint against Mr. McAllister, is that right? A. That is right. I was asking for overtime for the work I done for him. 830

Q. And you filed that complaint with Mr. Bullis? A. That is right.

Q. All right. Now what happened after that? A. Well, he said he will see the chief about it with McAllister, so then I just dropped it. I said, "All right, I will wait and see what develops."

Q. Well, was there a formal hearing before the chief engineer? A. Yes.

Q. Did you attend that formal hearing, and Mr. McAllister and who else? A. Well, when I was there I couldn't say that they had the words then. They waited until I got away because they did not want the man down below to hear whatever they say. 831

Q. In other words, you weren't present when the formal charges were made? A. That is right.

Q. What happened after that? A. Well, I just went down below to work again.

Q. Did you have any other incident with Mr. McAllister after that? A. Pardon me?

Q. Did you have any incident with Mr. McAllister after that, or did the work run along smoothly after that? A. Well, the work was a little tough on me, because I had to keep doing what he wanted me to do. I couldn't very well refuse, because they could just as well say "You are logged," and there is my pay, see, so I just have to follow orders then though I am not supposed to do the work.

832 Q. So you did Mr. McAllister's work and you put in a claim for overtime for it, is that right? A. Well most of the time I put overtime in, yes.

Q. And you were paid for overtime, for doing his work, is that right? A. Yes, sir.

Q. That was before you got to Shanghai that you started doing his work, is that right?

Mr. Gray: That is objected to. He is leading the witness.

833 Mr. Rassner: All right. I thought he did say that. I was trying to facilitate matters.

The Court: Before you got to Shanghai the second time, is that right?

The Witness: That is right.

Q. What happaned after that, that is, from Hong Kong to Shanghai the second time? What happened after that? What did you observe about Mr. McAllister? A. Well, I mean his personality changed completely to me. Before we were pretty friendly, and then all of a sudden he started getting very aggressive, and I don't know if you call it aggressive. I can only say ornery, that is all I know about 834 words, I mean.

Q. What did you observe about his conduct, his appearance, his demeanor? A. He looked all right to me.

Q. What was the next thing you knew about him? A. Well, I know one thing, he just went up topside after he finished work. That is all I know.

Q. Did you ever see him in this room? Did you ever go to his room? A. Yes. I found out he got sick later on.

Q. When did you find out that he got sick? A. That was in Shanghai.

Q. How many days before you left Shanghai for Tsingtao did you find out that he was sick? A. Oh, I couldn't say that exactly.

Q. Not exactly? A. No.

Q. Approximately? A. Oh, I will say two or three weeks anyway, and before we left Shanghai for Tsingtao I know he wasn't feeling good. I knew that then.

The Court: He was feeling good or wasn't?
The Witness: He wasn't.

Q. You observed the change of conduct in Mr. McAllister several weeks before you left Shanghai for Tsingtao, is that right? A. That is right.

Q. All right. Now when did you first see him in his bunk? A. Oh, that was about—I couldn't say exactly. 836

Q. Well, with reference to Shanghai was it before or after you left Shanghai for Tsingtao? A. Well, it was in Shanghai I seen him up topside, yes.

Q. When you say "up topside," what do you mean by that? A. Above our deck.

Q. Where was he? A. In his room.

Q. And what did you observe about him? A. Why, I know one thing, I even asked him—I said, "What is the matter, got bugs in the bed there?", because he was a little jumpy there, there is no doubt about that.

Q. What do you mean by "jumpy"? A. He was jumping around like this here (indicating). That is all I could 837 see.

Mr. Rassner: The witness indicates a twitch with either shoulder.

Mr. Gray: Both shoulders.

Mr. Rassner: I said "either shoulder." It is both.

A. (Continuing.) I couldn't say what shoulder I seen, I can tell you that.

Q. What did you notice, if anything, about his arms and legs? A. That is what I say. I figured something

838 *John Brodowski—Direct.*

was in his sack or something, because he was moving around.

Q. Were these motions deliberate or involuntary so far as you could see?

Mr. Gray: That is objected to.

A. I couldn't say that.

Mr. Gray: The witness is not qualified.

839 A. I don't think he done it because he wanted to do it. It doesn't look like that to me anyway. I know I don't twitch and move around for no reason at all. I don't think he would either.

Mr. Gray: I object to this, your Honor. This witness is not competent to give medical testimony.

Mr. Rassner: I am not asking him to. All I said is, "Tell us what you saw."

Q. Is that what you saw? A. Yes, that was one time, yes.

840 Q. And the vessel was still at Shanghai, is that right? A. Just before we left Shanghai, yes.

Q. Can you tell us whether it was a question of hours? A. No.

Q. You don't know? A. No.

Q. But after that the vessel sailed from Shanghai to Tsingtao, is that right? A. Tsingtao, yes.

Q. Did you go up to see him again after that? A. I seen him about three or four times, that is all I know of.

Q. What was the purpose of you going to his room after you had filed a complaint against him? A. Well, you figure a guy is sick, even though you don't like the guy sometimes, if he is sick you go see him anyway. He is your shipmate. When he was in trouble, regardless of whether I did not

like him or not, if I seen him in trouble ashore, I would help him out, because I know he will help me out of trouble if I was ashore, too.

Q. So you forgot about your personal difficulties, and you went to see him? A. Yes.

Q. Did you offer your help or something? A. A few times I asked him if he wanted coffee or a sandwich or something.

Q. What did he say? A. No, he did not want anything.

Q. Did you ever see him out of his bunk after he left Shanghai? A. Oh, no.

842

Mr. Rassner: That is all.

Mr. Gray: No questions.

(Witness excused.)

The Court: That is all we have now.

We will take a recess until tomorrow morning at half past ten.

(Adjourned to February 5, 1948, at 10:30 a. m.)

New York, February 5, 1948, 10:30 a. m.

Trial Resumed. 843

Mr. Rassner: Sister Elizabeth Kenny, will you take the stand, please.

ELIZABETH KENNY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Rassner:

Q. Sister Kenny, I am not going to ask you when you were born, but I would like to know where you were born.

A. I was born in Warrialda, New South Wales, in 1886, on the 20th of September. I am 61 years old.

Q. Will you be good enough to let me have your educational background? A. I was privately educated in my father's home until the age of ten. I then went to school, St. Ursula College, in Armidale, New South Wales.

Q. And what subjects did you take there? A. Well, that was a college you usually went to to learn to be a lady, but I am afraid I didn't graduate.

Q. Well, I hate to differ with my own witness in a courtroom, but I think you did excel, however. Would you
845 mind telling us what studies you specialized in after you left the college? A. Well, I specialized in certain—Dr. Aeneas John McDonnell, who was a good friend of mine, and I had a young brother. My younger brother, who was not very well—he was rather weak, and I undertook to see if I could not strengthen him to the same degree as my other brothers. I got the assistance of Dr. Aeneas John McDonnell, who taught me physiology and anatomy in detail.

Q. How old were you at that time? A. I was fourteen years of age.

Q. And where was this? A. That was at my father's
846 home in—outside of Toowoomba.

Q. Did you become interested in infantile paralysis before or after you studied human anatomy under Dr. Aeneas John McDonnell? A. I was interested in physical weakness. I did not become interested in infantile paralysis until after I was practicing as a nurse in the bushland of Australia.

Q. Would you mind telling us when you started acting as a nurse? A. In the year 1911, in September 1911. In 1912 I encountered my first patient, a little child four years of age, the daughter of a settler who had emigrated to Australia and had taken up land in the out back parts of our country.

Q. What training did you have in the study of infantile paralysis? A. At that particular time I did not have any training in the disease infantile paralysis. The disease presented new conditions to me altogether, and I was very much disturbed because the child seemed so very ill and I was one hundred miles away from a doctor and the roads were very rough, and the only communication would be by letter or telegraph.

So I telegraphed to my doctor, who was Dr. Aeneas John McDonnell, and described the conditions of the patient, and received word back that the disease I had described was infantile paralysis. 848 There was no known treatment for the disease and I was to do the best I could with the symptoms I saw.

The symptoms I saw happened to be just exactly the opposite to that generally accepted throughout the medical world.

Q. And what were those symptoms which you saw? A. I saw that that part of the body which was supposed to be normal and contracting and pulling the body into a condition of deformity was not normal at all. It was badly disturbed by the disease and very painful and required treatment.

Q. What further work and training did you have in 849 the subject of infantile paralysis? A. I had no other—only just the ordinary teaching that you got on theory, et cetera. I had no training concerning the treatment of the disease. I had to evolve a treatment for the symptoms that I saw.

Q. Now, when did that start? A. When did what start, the symptoms?

Q. Your evolving the theory or recognizing it? A. Well, I recognized the conditions—you see, when you are nursing in Australia, you are on your own initiative, as it were, and life in Australia is very precious, and if a patient dies, well, you are sort of blamed for it, so you

have to be very particular, and I watched very minutely every action of the patient and every condition that presented itself, and I saw this shortening appearing, and I tried all sorts of remedies until eventually I did—the patient was in great pain and I put hot—first I tried poultices and then hot salt, and everything in that category, and eventually I did try hot foments, that is, woolen clothes wrung out of boiling water, and the patient went to sleep in a few minutes and slept for quite a while and awakened up and in her own language called out, "I want them rags that wells my legs." So the patient herself approved of the treatment and I continued it.

Q. When was this, for the first time? A. That was within twenty-four hours of my going to the home.

Q. I did not quite make my question clear. I mean what year was it that you first started using hot packs? A. 1912.

Q. Where was that? A. It was a place called West Halden, in the State of Queensland, Australia.

Q. What was your method of compensation at that time? How were you compensated for your work? Were you employed by the hospital or by the city? A. I was never employed by anybody. My work has ever been voluntary. I receive no fees, salary or allowances from anybody, and I devote my life to the service of the poor.

Q. Have you ever been employed by anyone, so that you had to take orders or directions from anyone? A. I have in the military. I was four years a military nurse during World War I, and I had to take orders and directions from my superiors, but at this particular time, before that or since, I have taken orders from medical men only, if I were nursing any patient, that is, that they could prescribe for, and I saw that the prescription was doing the patient some good, and I adhered strictly to medical orders always.

Q. You were always acting under the supervision of

trained or at least licensed doctors? A. I never would work outside of the field of the duly qualified medical practitioner.

Q. That is right, and that has always been your situation? A. That has been my—I promised old Dr. Aeneas John McDonnell, when he informed me I had made a great discovery and that the world had asked me to demonstrate it, and I promised him that I would never go outside the field of the duly qualified medical practitioner.

Q. Thank you, Sister Kenny. Now, will you tell us something about the extent of the disease in the bush country? A. Well, it is not very extensive, as a rule, in Australia, but at that particular time I had six patients, which was unusual in such a small locality, and the six patients recovered, which rather surprised Dr. Aeneas John McDonnell, when he told me that I had made a great discovery and the day would come when I would be asked to explain it to the medical world. 854

Q. Will you tell us what your observations were as to the symptoms and signs of the patient? A. Well, I have already stated that I had noticed that that part of the body which is supposed to be normal at the present day by the majority of the medical world, was not normal at all. It was badly disturbed in some way by the disease and required immediate scientific and skilful treatment in order to prevent the materialization of deformities and reduce the pain. 855

Q. How long have you been studying this subject, these symptoms and these signs? A. Thirty-eight years.

Q. How long did you stay in Australia, nursing in Australia? A. I remained in Australia until the year 1940. The year prior to the year 1940, that is 1939, it had been established, as stated here in the American Medical Journal, that nowhere in the world was there any treatment for the disease of infantile paralysis in the acute stage of the disease. In the same year of 1939 a committee of doctors

from Sydney, New South Wales, observed my work and said that I had evolved a satisfactory and intelligible treatment for the disease of infantile paralysis in the acute stage of the disease that held out more hopes for recovery than any other method known anywhere; and prior to that I had been to England and to the City of Melbourne, Victoria, when the two orthopedic surgeons stated that the deformities—stiffness and deformities that were prevalent in the patients they had splinted, or patients that they had received and treated from other surgeons, that was entirely absent in the patients treated by me.

They further stated that I had laid great stress to them on the condition which I called spasm, and that the matter required investigating. I think you have their comments there, sir.

Q. Yes, I have. A. You may read them, perhaps.

Q. Now I would like you, if you can recall the names, to tell us the names of the men that were on the medical committee that supported the Government of Queensland, Australia, concerning your visit to the United States of America. A. Dr. Jarvis Nye, Medical Superintendent of Brisbane Clinic, Dr. Felix Arden—they all had the highest qualifications obtainable in the medical field—Dr. Felix Arden, Medical Superintendent of Children's Hospital, Brisbane; Dr. Abraham Fryberg, Medical Director of the Public Health of the State of Queensland; Dr. Allen Lee, Professor of Surgery; and Professor H. J. Wilkinson, Professor of Anatomy, University of Queensland.

Q. Did you mention Dr. Stubbs? A. Dr. Stubbs Brown came in afterwards. He was not one that recommended my visit to the United States.

Q. But he did come in afterwards? A. Yes, sir.

Q. Who is he? A. He was an orthopedic surgeon of the General Hospital of Brisbane, Queensland, Australia.

Q. Did you mention Professor Wilkinson? A. Yes, I mentioned Professor Wilkinson—and Felix Arden and Aubrey Pye.

Q. Who was on the medical staff of the Royal North Shore Hospital of Sydney, New South Wales, Australia, acting as chairman—do you remember? A. Dr. Wilson Ingram. He is a Fellow of the Royal College of Physicians of England.

Q. And who were representatives of the City of Melbourne, Australia, as to the medical men? A. Dr. W. Foster, and Dr. Price; orthopedic surgeons of the City of Melbourne.

Q. Was there any representative of the Department of Charities of the State of Victoria? A. Yes, Mr. McVilly.

860

Q. Was there any person present from the British Medical Association, City of Auckland, New Zealand? A. Yes. There was a meeting in the City of Auckland, New Zealand and the whole branch of the British Medical Association was present at the meeting.

Q. Who is Dr. Erdley Button? A. He is president of the Council of the British Medical Association of the Dominion of New Zealand.

Q. And was he one of the men? A. Yes.

Q. Will you tell us what your concept was with reference to the disease infantile paralysis? A. Yes. The old concept of the disease infantile paralysis was that is was a virus disease attacking the motor neurones in the central nervous system. The peripheral structure, which means the skin and tissue and muscle fiber, were in no way directly affected by the disease, but were affected, that is, that part correlated to the motor neurones, which were damaged or destroyed in the central nervous system, would become flaccid or paralyzed and hang like a hammock between their points of origin and insertion.

861

Q. What was the old concept as to the cause of deformities? A. The old concept as to the cause of deformities was strong normal muscles pulling against weaker or paralyzed ones.

Q. Who is Dr. W. Foster, and Dr. Price? A. Two

orthopedic surgeons of the City of Melbourne, Victoria, Australia.

Q. Did they make an investigation as to the results of your treatment? A. Yes.

Q. And were their findings published? A. Yes, they were published in the Australian Medical Journal in the year 1938, or early in 1939—I have forgotton which.

Q. Do you remember what they said with respect to deformities or muscle imbalance? A. Yes. They said in the Kenny treatment patients expected deformity from muscle imbalance which did not materialize but which did materialize in their own splinted patients they themselves treated or received from other surgeons.

Q. Do you remember what they said as to stiffness? A. Yes.

Q. After the Kenny treatment was used. A. Yes. They said stiffness, which was a troublesome feature in the patients they themselves treated or received from other surgeons, was entirely absent in the patients treated by the Kenny method, under my supervision.

Q. What findings as to muscle spasm were had when your treatment was used? A. Muscle spasm was unknown in the medical world. They said, "Miss Kenny lays great stress on the condition of muscle spasm, its prevention and cure. We consider her views on this subject require careful consideration."

Q. Were there any comments in the Journal of American Medical Association in 1939 about your treatment? A. Not about my treatment, but there was about the orthodox treatment. They said it was reported by Dr. Kristian Hansson of the City of New York that "Nowhere in the world was there any treatment for the disease in the acute stage of the disease."

Q. Well, that is exactly what I had in mind.

Dr. Kristian Hansson was connected with what hospital? A. The hospital now known as Special Surgery; then known as the Hospital for Ruptured and Crippled.

Q. Who were Dr. Fletcher, Dr. Roberts and Dr. Little? A. Doctors Fletcher, Roberts and Little were a committee of doctors that visited Brisbane, Queensland, Australia, from the City of Sydney, New South Wales, Australia, to see if there was any treatment for the disease infantile paralysis in the acute stage, according to the Kenny method.

Q. Do you remember their comments? A. Yes, sir.

Q. Would you mind letting us have them? A. They said that: "Miss Kenny has evolved a satisfactory and commendable treatment for the disease infantile paralysis in the acute stage of the disease which holds out more hope for recovery than any method known anywhere." 866

Q. Were you advised to visit the United States? A. Yes. I was advised—first of all, I was advised to visit Germany.

Q. By whom? A. By a committee of medical men in Brisbane, Australia, and the consulate for Germany then in Brisbane.

Q. When was this? A. That was early in 1939.

Q. Did you do so? A. No. We went to war with Germany and I couldn't go, but then—

Q. That was our good fortune that you came here. A. Yes. I was then advised to come to the United States of America and place my contributions here. 867

Q. And did you do so? A. I was first—the Premier of my country wrote a letter to Mr. Basil O'Connor, president of the National Foundation for Infantile Paralysis, and a committee of medical men already referred to wrote to the Mayo Clinic of the United States of America.

Q. Who is Dr. Wallace Cole and who is Dr. Miland Knapp? A. They are professors of orthopedic surgery of the University of Minnesota, and professor of physical medicine in the University of Minnesota.

Q. What were their comments as to your concept? A. They said I had presented views that were absolutely new concerning the symptomology and treatment of the disease

infantile paralysis, and they were exactly opposite to that generally accepted throughout the medical world.

Q. Do you remember how they described your ideas? A. Yes. They said I had presented conditions which I described as alienation, incoordination and spasm, which was just exactly the opposite of that generally accepted throughout the medical world.

Q. When they spoke of "alienation" did they describe "alienation" as to any particular feature of the body? A. Well, that part of the body that was expected as paralyzed. I don't know how they described it—I have
869 forgotten what they said at the time; but I remember they said that I presented the opposite concept, and that the condition of spasm was found in 100 per cent of the cases.

Q. This alienation or mental alienation, what is that? A. It means that when that part of the body which is becoming shortened by the disease, will challenge the opposing muscle. For instance, if the biceps (indicating) are shortened by the invasion of the disease, the triceps (indicating) become long and the patient will recognize the fact that if they try to stretch their arm out it will cause pain, because it is pulling on the sick muscles, and therefore they will persistently refuse to make any mental effort to
870 extend the arm, knowing that if they do they will suffer pain through the pulling on the part that is disturbed by the disease, which was previously thought a normal condition.

Q. What is known as muscle incoordination? A. Muscle incoordination is the part which has been so disturbed by the disruption of the mental pathway that it will not contract. The focal point has been obliterated from the cerebrum and the patient cannot direct the mental pathway to the focal point in order to procure a rhythmic action or a rhythmic contraction of the muscle itself.

Q. What is muscle spasm? A. Muscle spasm is a shortening of the part. It is not any particular activity, but it

is a shortening of the part which will also—it is not altogether restricted to muscle, but it also occurs in the fascia and the skin.

Q. You mean there by a muscle spasm that the patient may feel and yet the observer can't see? A. Yes.

Q. Could you explain that? A. Well, it is impossible for me to explain it, but if you do try to lengthen that particular part or pull on it, the patient will make a noise or complain of a pain.

Q. So you then know that spasm is there? A. Yes.

Q. Even though you do not see it with your own eyes? 872
A. Yes. I know that the condition is present. As a matter of fact, there is a method of detecting the onset of that condition before pain is present, and if that can be treated the pain can be avoided.

Q. Sister Kenny, you anticipate my further questions. However, as long as you have started telling us something about that, suppose you continue. Tell us how you can anticipate the onset of the active acute spasm. A. Well, before I could intelligently describe that to you, sir, you would have to understand the classification and typing of all the peripheral structures, and that is something also which I have brought into the United States of America. You would have to understand how to examine the patient, 873
to see where that condition did present itself, but I can give you an example of being asked by Dr. Nelson in Los Angeles to see four patients whom they were going to discharge from the hospital. They thought there was nothing the matter with these patients. He asked me to drop in and have a look at them. I said it would be useless for me to drop in and look at them unless some medical men were on hand, so four medical men came with me and I did detect on these patients the part that was likely to be invaded—that was already invaded by the disease, and the disease would make its presence known inside three or four days. On each patient I described those conditions

and the part was invaded in the time described by me; that is really early diagnosis.

Q. In other words, your understanding of early diagnosis is before the spasm or paralysis actually sets in? A. Certainly.

Q. Who is Dr. Alfred Deacon? A. Dr. Alfred Deacon is an orthopedic surgeon in charge of the Children's Hospital, Winnipeg, Canada.

Q. Did he make any comments about flaccid muscles reacting to your form of treatment? A. Yes.

875 Q. When was that, do you know? A. That was in 1941—1942.

Q. Do you remember what he said? A. Yes. He said, "We were astounded to see Miss Kenny restore to normal conditions muscles which we had regarded as flaccid or paralyzed."

Q. What was the old concept of flaccid muscles? A. The old concept was that the motor neurons controlling that part were destroyed by the disease.

Q. What is actually a flaccid muscle? A. A flaccid muscle is one that hangs limp between its point of origin and insertion and loses contractility.

876 Q. Who are Dr. Schwartz and Dr. Boehm? A. Scientists at the University of Rochester, New York.

Q. Did they do an electromyographical research or biological research? A. Yes, they did an electromyographical research on the concept of the disease infantile paralysis.

Q. Will you tell us what the electromyographical research is? —just generally without going into detail. A. Electromyographical research is a test by chronaxia—an investigation to see if certain conditions are present in the parts that were previously unknown.

Q. In other words, would it be fair to say that it is a recording electrical machine which makes certain marks, depending upon certain stimuli of the body? A. Yes. The machine records the activity of the contractility of the part by light, and it can then be recorded.

Q. Was any pathological research ever made? A. Yes. The pathological research was made in the Cajal Institute in Madrid, Spain.

Q. By whom? A. By Professor Sanchis-Olmos.

Q. And who is he? A. He is the professor in charge of the Institute Cajal in Madrid.

Q. What were his findings? A. I think the findings were that they found anatomical lesion, which support the theory presented by Elizabeth Kenny, and the findings of an electromyographical investigation also supported the theory that—to use their words, they said that Miss Kenny 878
was treating a condition which actually did exist, although previously unknown.

Q. What was the old concept of infantile paralysis? A. I have already stated that, sir.

Q. May I have it again—the physicians always thought it was what? A. A virus disease attacking the motor neurons in the central nervous system which controlled the movement of the muscles.

Q. And the old concept was that that was really paralysis, wasn't it? A. No; paralysis was caused through the damage or destruction of those motor neurones in the part corelated to those motor neurones. 879

Q. Now how do you describe infantile paralysis? A. Infantile paralysis, according to the—I presented my clinical findings to scientists and their report was—this is not my report, but their report was that they had found two types of paralysis: One, peripheral origin; that is the one that I had discovered. That was my great discovery. The other is of central nervous system origin. That is the scientists' discovery.

I discovered that that part of the body which was thought to be normal and causing deformities was not normal at all, but badly disturbed by the disease and required scientific and careful treatment.

Q. When you found that a muscle was in spasm you did not conclude that it was paralysis, did you? A. No, but it could become paralyzed if it wasn't treated.

Q. That is exactly what I have in mind. A muscle that is— A. It could become destroyed if it wasn't treated.

Q. In other words, it is the absence of treatment— A. Yes.

Q. —that causes it to become paralyzed? A. That treatment is a lot more than placing hot packs on it, I might tell you.

Q. I realize that, but we will come to that a little later. In any event, what I am trying to ascertain is whether the fact that a muscle is in spasm is indicative of the fact that it is paralyzed? A. It is not paralyzed at that particular moment—not always.

Q. That is what I mean. A. It may become so if it is not treated.

Q. Exactly. Now supposing it is not treated; will the spasm continue indefinitely? A. I have known spasm to continue. I have seen the results of spasm. It continues. The spasm may continue until it destroys the muscle and there is no definite time about that—and it may not. It may recover to a degree and it may fully recover, but in all probability it will continue until it does some damage or destruction.

Q. Are you familiar with the book "The Importance of Research"? A. Yes.

Q. Do you remember a comment there about your treatment being instituted and what its effect would be upon contractures and deformities? A. Yes. It was acknowledged—all the statements that I am repeating, sir, are those made by medical men, not by me. According to the statement in the book, "The Importance of Research" was that for hundreds of years contractures and deformities had been present as the after effects of the disease infantile

paralysis. These contractures and deformities but with the newer-type treatment as introduced by Miss Elizabeth Kenny, these contractures and deformities would become almost a thing of the past. But this could not be said of any other form of treatment because there were in America today thousands and thousands of patients who would have to undergo surgical repair to correct their crooked bodies and twisted limbs.

Q. In other words, if the Kenny treatment were not administered promptly then the only thing left later on would be surgery, is that right? A. Well, that was the alternative. I wouldn't say the only thing, but that is usually and has been the alternative in the past. 884

Q. Now who is the author of "The Importance of Research"? A. Dr. Don Gudakunst and Dr. Morris Fishbein. Dr. Don Gudakunst is medical director of the National Foundation for Infantile Paralysis, and Dr. Morris Fishbein is editor of the Journal of the American Medical Association.

Q. And is it a fact that they concluded that if the Kenny treatment was immediately instituted at the early stages of the disease, that contractures and deformities were eliminated—the danger, rather, of contractures and deformities were eliminated—in substance, is that their conclusion? A. That was their conclusion according to the report in their book, and that has been substantiated since. 885

Q. Now who is Dr. R. Kovacs? A. He is a doctor here in New York and has something to do with physical medicine. I think he was the president of the Department of Physical Medicine of the United States of America—I am not quite sure.

Q. Do you remember his comments as reported in the "Archives of Physical Therapy" in the September, 1942, issue? A. Yes. I think he said that after two years there were no spinal deformities and no contractures, or deformities in the Kenny-treated patients; and some of them

could walk very well even if they had weakness or paralyzed muscles, without the aid of artificial support.

Q. Do you know Dr. Philip Lewin? A. Yes.

Q. Are you acquainted with the book that he has written? A. Yes.

Q. Do you remember what he said in the year 1942 in the Illinois Medical Journal? A. Yes. He said that the Kenny process was the greatest contribution given to medicine since the time of Lovett, I think—the late Dr. Lovett, and Sir Robert Jones.

Q. What did he say about the effects of your treatment on pain and the patient? A. That it eliminated pain more quickly than any other—than anything ever tried before, or something to that effect.

Q. Didn't he go a little further? Isn't your innate modesty getting the better of you? Didn't he say it abolishes pain and stiffness? A. Yes, he said it abolishes pain and stiffness.

Q. And what did he say about treating the symptoms in the acute stage, as to the likelihoods of recovery? A. Well, the patient had a very much better opportunity for recovery when treated in that particular way than any other method.

Q. And did he make a categorical statement about contractures and deformities? A. Yes. He said they could be eliminated.

Q. Very well. Now, do you know Dr. Frank Ober? A. Yes. I met him—

Q. Who is he? A. He was—when I met him he was president of the Orthopedic Society of the United States of America, and he is at Harvard University a teacher at Harvard University.

Q. Do you remember what he said in 1942 when he spoke about your treatment? A. Well, he said many things. He said that I had introduced a condition that was new and unknown to the medical world, and that it required imme-

diate treatment, I think. That is as far as my memory will carry me.

Q. I won't burden you much longer, Sister Kenny. A. It is no burden to me. I am only too happy to help America in any way I can, and I do think that my knowledge should be disseminated throughout the world and throughout America especially.

Q. Can you tell me who Dr. Nicholas S. Ransohoff is? A. An orthopedic surgeon associated with the New Jersey Medical Center.

Q. Do you remember his article in the "Journal of Bone and Joint Surgery," in January of 1944, where he spoke of knee flexion and other things? A. Yes. I remember that case very well indeed. I had met Dr. Ransohoff at the hospital, the New Jersey Medical Center, and he presented to me a patient whom he said had the best treatment in the world that could be given to him. I asked him what was the best treatment. He said the best Kenny mixed with the best orthodox, and he remarked that the child was unable—he had received it for eight months and the child was unable to raise his head or raise himself in a sitting position, and I remarked to Dr. Ransohoff that I did not consider that the best treatment in the United States of America; that I would consider that good mongrel treatment, but if he allowed me to give him good Kenny treatment for five minutes, he would see the difference. 890 891

I asked him what was the procedure about this case and he said he and Dr. Leo Myer had considered doing the Lohman operation on this child, which meant that he would have the transplantation of the fascialied—that is the muscles of the thigh here (indicating)—to be placed across the abdominal wall on both sides, to stabilize the abdomen.

I asked Dr. Ransohoff how long would he be in the hospital and he said several months.

I asked him would he have to wear artificial supports. He said yes.

Then I asked his kind permission to be allowed to give five minutes good Kenny treatment, and I think Dr. Ransohoff has the mind and the heart of a true physician, and he gave me that permission, and he did write in the Journal of Bone & Joint Surgery that in two and a half minutes I had corrected the deformities and the child was able to raise himself into a sitting position and maintain himself there in a V position, and in half an hour I had the child walking, and in two weeks he was home.

Q. Did he also write about your demonstration of the treatment as affecting the incoordinated hamstring muscles which could not flex the knee? A. Yes, sir. He said the child could not flex his knee, he could not walk either, because he could not flex his knee; and I said he did not have any paralysis of the hamstrings, he did not have any paralysis of the abdominals; and as I have already stated, I restored the abdominal muscles in two and a half minutes, knowing what was the cause of their flexion, and I also corrected the incoordination in the hamstrings at the same time, and the child was able to walk.

Q. Now between the years 1940 and 1944, do you know about how many children were treated at Minneapolis for infantile paralysis? A. Well, in 1940 to 1944—there is quite a lot since then, but I think there were 146 of school age.

Q. I see you know that. You need no records to refresh your recollection. That is it exactly.

Now how many of those required surgery after they had received your treatment? A. None. There was none that required surgery; none required to be educated in a crippled children's school and none wore braces.

Q. On the question of confirming your findings, was there an article in the Journal of Bone and Joint surgery in 1945? A. In 1940-what?

Q. 1945. A. Yes.

Q. Do you remember what it said about anatomical

lesions? A. Yes. Their findings confirmed my observations concerning the disease of infantile paralysis.

Q. Who is Dr. Huenekens—I may not be pronouncing it correctly. A. Huenekens.

Q. H-u-e-n-e-k-e-n-s—is that Huenekens? A. Huenekens, yes. He was the chairman of the Polio Emergency Committee in the City of Minneapolis during the worst epidemic known in the history of the State and the City.

Q. Did he make a comment as to the crippling effects of the disease on adults after they were treated by the Kenny treatment? A. He made a comment on both adults 896
and children, and said that my contributions had saved hundreds of adults and children from the crippling effects of the disease infantile paralysis.

Q. Did he say anything about your treatment preventing the materialization of twisted limbs? A. Well, he did not say anything definite about that, I don't think. He said it prevented the crippling effects of the disease, that is, twisted limbs and crooked spines, et cetera.

Q. Well, again I think I will have to challenge your innate modesty. Did he not say in "The Importance of Research" that your contributions would prevent the materialization of twisted limbs and crooked bodies— A. 897
Huenekens did not say that, sir. That was Dr. Fishbein.

Q. Was that Dr. Fishbein? A. Dr. Fishbein and Dr. Gudakunst.

Q. I though it was Dr. Huenekens who made that statement. A. Dr. Huenekens made the statement that my contributions had prevented the crippling effects of the disease infantile paralysis in hundreds of cases.

Q. I see. A. The other doctor said in thousands of cases—there were thousands of Americans that could have been saved from the crippling effects of infantile paralysis if they had the unmodified Kenny treatment.

Q. In how many cases is the spasm present? Is it general, or does it just happen occasionally. A. It can be

found in 100 per cent of the cases by those who know what to look for.

Q. Who is Dr. Pohl? A. Dr. Pohl is the medical supervisor of the Elizabeth Kenny Institute in Minneapolis. He is professor of orthopedic surgery of the University of Minnesota, and he is the attending orthopedic surgeon at the Minneapolis General Hospital in Minneapolis, Minnesota.

Q. What did he say about your demonstrations, as to the effects of the shortenings of the muscles on other parts of the body? I have reference to the skin and the subcutaneous tissue and so on. A. That he definitely saw them. Those were my findings, my clinical observations, and they were confirmed by Dr. John F. Pohl. He has been associated with me for seven years.

Q. Is the book that has been written by him the one in which you collaborated? A. Yes.

Q. Is that the book "The Kenny Concept of Infantile Paralysis and Its Treatment" by Dr. John F. Pohl, M. D., in collaboration with Sister Elizabeth Kenny? A. That is the book.

Q. What did he say about the local process, the process of the disease—do you recall that? A. I don't recall. He said so many things.

Q. Well, I call your attention to this comment, and I ask you if you recall it:

> "The muscle and its enclosing fascia present the most striking evidence of a local process."

A. That is right.

Q. Will you explain that, please. A. Yes. The architecture of the muscle is altogether disarranged by the invasion of the disease in this condition of shortening, and the fascia which surrounds that muscle is also present on the underlying tissue, and on the top of that the skin is

901

also shortened and presses on the whole peripheral structures, the peripheral structures underneath; that is, the fascia and the contractile tissue. You see, that is the reason why hot foments are not purely Kenny treatment. It is the architecture that has to be attended to as well as everything else.

Q. Do you remember the comments in the National Foundation for Infantile Paralysis Report for 1945 as to the effects of the disease on the human body if not treated immediately by your method? A. Yes. In the report of the National Foundation for Infantile Paralysis I saw a statement that they were given $20,000 a year to the University of Rochester for research, to find a drug therapy to treat the condition discovered by me, known as spasm, and if it was not treated the contractures, paralysis and deformities would occur. That has been emphasized very much during the epidemic in Minneapolis and here in the City of New York.

902

I frequently come in contact with patients who have received what is known as modified Kenny treatment, who have developed deformities, and I think it is recorded that at the Gillette State Hospital, during the epidemic in Minneapolis, I was called in to see a young girl 16 years of age who had the deformity, the same type of deformity as the patient of Dr. Ransohoff, and around that table there were Dr. Danice from Canada, eight American doctors, two Australian doctors and technicians trained in all the outstanding training schools in the United States of America, such as Georgia Warm Springs, Cornell University, Stanford University, California, the University of Minnesota, et cetera.

903

I asked these people, doctors and technicians, had they been taught why this condition materialized and how to prevent it and they said, No, that they were taught the modified Kenny treatment, and they also informed me that they had been eight months trying to correct this deformity.

However, I did in the same way correct that deformity in five minutes, in their presence, and described to them how it materialized.

I also did the same thing in Dublin, France, Sweden, Norway, Denmark. I asked these gentlemen, the orthopedic surgeons in charge of each individual case what procedure would they take to correct it themselves, and they informed me that they had asked me had I read the American Medical Journal of January, 1947, where four major operations were described to correct this deformity. This paper was presented by Dr. C. E. Irwin of Georgia Warm Springs, and they remarked that their method of correction would be one or the other of these four operations. However, in less than five minutes in every instance I corrected the condition.

Q. Then you agree with this quotation from Dr. Lewin's book on infantile paralysis, reading from page 79, which has been testified to here yesterday by Dr. DiFiore as to the importance of early diagnosis: "The importance of diagnosis prior to the moment at which the virus attacks the nerve cells of the spinal cord cannot be over emphasized. Diagnosis and treatment should be considered in terms of minutes and hours, not days." Do you agree that it is important to institute treatment immediately as soon as the patient shows signs of being ill? A. Certainly I do. I consider that the whole future of the patient depends upon that treatment in that particular stage of the disease.

Q. Well, I was going to ask you the effect of failing to treat a patient for about nine days and just letting him lie in bed without any treatment at all—whether that would be a competent producing cause of permanent crippling effects? A. Well, that was the old procedure, you see, sir. According to the orthodox concept they did not give any treatment at all, and that was all—

Q. Well, was that a competent producing cause for

crippling—permanent crippling effects? A. Oh, yes. That would be a damaging effect upon the patient, certainly.

Mr. Rassner: Thank you.
Your witness, Mr. Gray.

Cross Examination by Mr. Gray:

Q. Sister Kenny, I am going to ask you some more questions, to give more details of the testimony that you have already given—if you are not too tired. A. I am not too tired. I am never too tired to help humanity. 908

Q. I was interested very much in ascertaining what symptons you look for to see whether you can detect polio before the ordinary doctor can do so. A. I look for symptoms of resistance.

Q. And how do you look for them. A. By flexing the joints and extending the muscles—or not only the muscles but the whole peripheral structure—the skin, fascia, et cetera.

Q. You go over the patient's whole body? A. Yes.

Q. That is, all their limbs? A. Yes.

Q. Supposing this patient eventually came down with a type of polio that affected his respiratory muscles; could 909 you have anticipated that? A. Well, that is a different type altogether, sir.

Q. I see. A. We do—I can detect the oncoming of that to a certain degree.

Q. In other words, there is more than one type of polio, is there? A. Yes.

Q. How many types of polio do you recognize? A. Well, I don't make any statement about recognizing types. I only present what has been proven by the medical world, statements made by them concerning my work and my methods, and their own statements. I am not an epidemiologist. I am just a clinical observer.

Q. Do you feel that the result of your investigation and discovery has been properly disseminated in the United States through the legal profession? A. I do not think it has been disseminated to the medical profession, therefore it certainly cannot be disseminated to the legal profession.

Q. I meant to say the medical profession. A. No, it has not.

Q. And isn't that one of the problems that you are trying to overcome now, is to have your knowledge disseminated throughout the world to the medical profession? A. Yes. Every six months, approximately, during the last three years, I have applied for a conference to the National Foundation for Infantile Paralysis, for a conference in order that I may present these conditions. For instance, when Dr. Irwin of Georgia Warm Springs wrote the article about the necessity of four major operations for the correction of the deformity known as pelvic obliquity, I immediately sent a telegram to Mr. O'Connor, telling him that I could demonstrate to Dr. Irwin and his colleagues, at a conference, how to prevent the materialization of this deformity and how to correct it, but I did not receive any reply from Mr. O'Connor.

Q. And is that the general condition which you have met throughout this country since you have been here? A. No, sir. I think the medical profession has been wonderful in this country, and every doctor that has come to Minneapolis has gone away very much impressed.

I have four hundred letters from American doctors, telling me that I presented them with a new concept and led them along a new pathway of treatment.

I also have in my possession a letter from the last doctors' class at the Institute in Minneapolis, consisting of six medical men from the Marion County Medical Society of Illinois, telling me that I have made a discovery that any doctor would be proud of forever and ever, and they

had learned very much, and with the hope that American doctors would follow their example and learn also.

Q. Do you have any suggestion as to a more divers dissemination of your knowledge through this country? A. Yes. I have plenty of suggestions to make. I have a suggestion that I should be encouraged to meet the doctors in conference, and that arrangements should be made for those procedures, in order that the medical men who are acquainted with my work, that I have a lot to teach—maybe I have a lot to learn—and I think it is necessary that we should confer and present our findings and let the 914
people of America share in everything that has been found out concerning this disease.

And further it is acknowledged that since the electromyographic and pathological proof of my findings has been definitely stated, I think that the conquest of the disease would be brought very much nearer by such conference.

Q. But there are a number of other details which I should like to have you explain to us. When you speak of stiffness, will you please describe whether that is stiffness of the joint or stiffness of a muscle or a tendon, or what? A. Prior to my findings, it was supposed to be a 915
stiffness of a joint, but it is not a stiffness of a joint at all; it is the destruction of the muscle itself by the disease, and the shortening of the muscle that had not been attended or treated.

Q. Will you please state what your theory of poliomyelitis is, as distinguished from the old concept? A. Well, I could only give my clinical observations. I am not an epidemiologist or a pathologist, but my clinical observations led me to believe that the disease was just the opposite to that accepted throughout the medical world, and that has been investigated by scientists in the Cajal Institute at Madrid, Spain, Milwaukee and the University of Rochester, and proven that I was correct.

Q. Then in order that I may understand it, do you feel that there is a virus which is responsible for the disease? A. Yes, certainly. Well, that has been the pathology and I don't ever question the pathologist's findings.

Q. Now the next step: Do you believe that the virus attacks the gray matter in the spinal cord or attacks the muscle itself more closely? A. The findings of science have proven that it attacks both.

Q. I see. A. And that is my contribution to medicine, that led to that scientific research and proved that I was correct.

Q. Then it was your hint that the effect might be more local with the muscle— A. Yes.

Q. —rather than kept in the confines of the spinal cord? A. Yes. It was my clinical observations that led to that investigation and has advanced the knowledge of the disease, they say, quite considerably.

Q. Now is it not true, Sister Kenny, that after the disease has even developed to a point where a person has been ill for two or three weeks, that if your system is applied you may catch up with the disease and save the patient? A. We have done that, according to the reports of medical men.

Q. And what type of treatment would you give in a case like that? A. We have to first apply the hot foments to relax the skin which has become short and tight. Then we have to restore the architecture of the underlying structures, which has been disturbed through this invasion, and then we have to get to the brain and restore the mental pathway to the focal point. It is quite a scientific procedure.

Q. Yes. It is really almost based upon the theory of electric current, is it not? A. Well, there is a pathway, you see, that connects the movement of the brain. The brain controls everything. One hears quite a lot about muscle re-education but you cannot re-educate a muscle.

You can restore its architecture. Then you can direct the pathway to the focal point from which the contraction of that muscle will occur.

Q. And am I correct in my understanding that your method keeps the muscle in as near normal condition as possible as to elasticity and its functioning powers, so that if you can restore the focal— A. Point.

Q. —point in the brain, you have your muscle in shape so that they can operate? A. That is right, sir. That has been the observations of the medical world.

Q. As a result of your discovery? A. Yes.

920

Q. Now when you speak of a peripheral effect, you mean the effect on the skin? A. The skin, fascia, and also the contents of the fascia, that is, the contractile tissue that gives the strength to the muscle.

Q. I am sorry, but I do not know what fascia is. Will you explain it? A. The fascia is a thin membrane covering each muscle. You may have seen it in animals.

Q. Yes, I have. A. Yes.

Q. And it is a sort of a method of permitting one muscle to rub against the other? A. It prevents the muscles from amalgamating and keeps them within their own architecture and within their own boundary. It is elastic but not contractile. When it gets back to its normal length it 921 stays there and keeps the muscle in there.

Q. Has it been your clinical observation that this membrane is affected by the virus itself? A. It becomes thickened. I have seen a medical man make an incision in the fascia and it has compressed the underlying tissue and become thickened and prevented the underlying tissue from relaxing, so therefore it could not contract because it was in ultimate—in the nth degree of contraction.

Q. In other words, it was in the sac. A. Yes, it was pressed within a sac.

Q. And compressed the muscle, too? A. Yes.

Q. So that this condition of shortening or contraction

is what you term spasm? A. Yes. Well, spasm is not quite the correct term, I wouldn't think. I called it that years ago because I had no other name for it, but it is a shortening of all the peripheral structures.

Q. To the ordinary layman, spasm usually means a sharp pain. A. Well, there is pain attached to it, so therefore—

Q. But this pain, is this pain continuous or is it temporary? A. Well, the patient protects himself against feeling the pain and he will shorten it within the area of
923 pain, and immediately that it is lengthened he will feel the pain again, you see. That is why he shortens.

Q. And then your method permits the muscle to expand and this fascia to extend and the elimination of pain in operating the member? A. Yes. That is our objective.

Q. Now isn't there more to your system than just a hot flannel pad? A. Certainly. That is only a preliminary. It is very unfortunate that that is usually thought throughout the world to be Kenny treatment, and one often hears that "She has had hot packs" or "He has had hot packs and has had Kenny treatment." That rather annoys me.

Q. Well, when is a hot pack method indicated? A. Right at the onset to prevent the skin shortening.

924 Q. And when does such a method become too late? A. When pathological changes have occurred, when the underlying tissues are no longer relaxable. They are in an inelastic mess. Instead of being elastic tissue they have changed to an inelastic mess which cannot be separated.

Q. Would you call that atrophy, or is that atrophy something else? A. Well, that is apparently atrophy because the space will be shorter and there is a pressure, that is, there are certain different types of atrophy. In infantile paralysis it is more compression atrophy than anything else.

Q. Then whether or not your hot compress method is too late depends on the pathological condition of the part

that is affected? A. The hot compress is only applied to relax the skin. We have other procedures to release the fascia which I have demonstrated on a documentary film.

Q. What do you do to release the fascia? In other words, I understand if you just used your hot pads and released the skin, you have only just started? A. That has just started, that's all.

Q. You must still continue on with your process to get complete results? A. Yes, sir.

Q. And what would be the next— A. Procedure.

Q. —procedure, after you have used the hot pads, the hot packs and extended the skin? A. Then to restore the architecture of the underlying tissue, to release the fascia and then the muscle tissue itself. 926

Q. What is the actual procedure for that? A. Well, that takes me two years to teach anyone.

Q. Well, can you tell us generally? Is it just massage? A. Oh, no, not massage. It is certain manipulations.

Q. It is what we might call physio-therapy? A. Yes, physical medicine. Physical medicine it really is in its more advanced stages.

Q. Would that mean infrared massage? A. No, no massage, no electricity, no lights and no massage.

Q. And no exterior heat? A. Yes, we do use hot packs. 927

Q. You still use hot packs? A. Yes.

Q. Even for the underlying surfaces? A. to keep the skin longer until we get the underlying tissue also treated and the architecture restored.

Q. Well, I am glad to know that the hot pack is not the beginning and the end of the method. A. It certainly is not.

Q. Well; particularly in the case of paralysis of the legs, is it possible to restore legs which have become paralyzed and partly atrophied, with your method? A. Well, we have—I think it is recorded by medical men that we have given back to useful citizens even where there is a certain amount of obstruction of the structures of the

lower limbs, that patients can walk very well and lead normal existence.

I think Dr. Kovacs has remarked that in his statement, and also it is exhibited on the documentary film.

The Scandinavian Physiotherapy Society has asked me to make another documentary film presenting our procedures, how we achieve that, because that is not easily achieved. They generally have artificial supports which are heavy and cumbersome and do not give the patient nearly the activity that they do have under our own care.

929 Q. What pathological condition would you look for where a person had both legs paralyzed to determine whether your method would bring about a recovery or the use of those legs again? A. Well, if the architecture of the structures of the lower limbs had been altogether destroyed and damaged, and we could not restore that architecture, then we would know that we could not give them a useful life.

Q. And as soon as those tissues have reached that state there is really nothing more to be done— A. No.

—Q. —for the victim, with your method or any other? A. No, not with any method. There are conditions in the disease that will not respond to any method.

930 Q. Now do you claim, Sister Kenny, that your method is a method which is a cure for the disease or a method that prevents deformation, distortion and some sequelae of the disease itself? A. I make no claims at all whatever. All the claims have been made by medical men, and the word "cure" never comes into my category in any disease. There is no cure for the common cold yet that I have ever met.

Q. It has to run its course? A. No. There is no treatment—not run its course at all. To be a cure you have to have one hundred per cent recoveries and I don't think any disease yet known has had one hundred per cent recoveries.

Q. Well, in your observations of infantile paralysis patients have you observed or have you reached the conclusion that your method arrests or stops the fundamental disease or rather affects the ultimate or the end results? A. Well, medical men have testified that it does definitely affect the end results.

As a matter of fact, since the introduction of my method, quite a lot of the unpleasant sequelæ, such as pressure sores, kidney stones, pyelitis, vaginitis, poor circulation, chilblains—have altogether been eliminated, they do not occur at all, and contractures and deformities have also 932
almost been eliminated.

There may be a few slight contractures when the Kenny treatment is not given as skilfully as it should be, but there are no deformities when the Kenny treatment is given as it should be given in its entirety.

That has been the observation of medical men—not my statement.

Q. But the disease itself, the existence of the virus and the disposition that is made of the virus by the vitality of the person who harbors it, is not affected by your treatment at all, as I understand it? A. What do you mean? I am sorry, sir, I don't quite understand you.

Q. Well, perhaps I don't understand myself. We start 933
with the proposition that it is a virus disease? A. Yes.

Q. That the virus itself has to run its course and that there is no way of stopping it; that the only way that your method can assist is to prevent distortions and other sequelæ that result from the effects of the virus on the system before the system is taken care of? A. I am afraid that that is not so. For instance, prior to the introduction of my work in the City of Minneapolis, the bulbar type, which is the severe type, the death rate was very high; in all countries I recently visited it was ninety per cent or sometimes one hundred per cent, while with the Kenny treatment that death rate has been reduced to fourteen per cent.

Q. That is a wonderful record: The bulbar type, is that the type that affects the brain? A. Yes. Well, this is not altogether the brain. It is the bulb of the brain, and that is very important because those cases, if they recover, generally make a complete recovery with no after effects whatever.

Q. And one type of bulbar involvement would be the respiratory muscles, would it not? A. Well, not necessarily the respiratory muscles. The death from bulbar cases is generally suffocating from the mucous which gets into the lungs.

Q. I see. A. They are not able to expel. It seems to increase tremendously. The respiratory type is the muscles of the chest which are involved, and with our method of treatment we also can prevent the necessity, in a great many cases, of the use of a respirator.

Q. The bulbar type, as I understand it, is that which requires much more prompt treatment than the types that affect the limbs or the lower portion of the body? A. Well, they all require prompt attention but they require consistent attention because the death rate is very high and very quick, within a few days.

Q. In the bulbar cases? A. Yes. As a matter of fact, I have seen parents bring their children as far as the back door of our institute and they died before they could come in. That is why any knowledge concerning this disease should be widely disseminated amongst the medical world to prevent these sad conditions.

Q. Of course in order to start the treatment the disease must be promptly diagnosed, must it not? A. Before you can give the treatment intelligently you must know what you are treating for.

Q. Exactly. A. Indeed, throughout the United States of America today a lot of people are using what they call Kenny hot packs, thinking they are treating the motor

neurones in the central nervous system. Well even to a layman that would appear ridiculous, wouldn't it?

Q. I should think so. A. Instead of that, you see, they should be taught the true disease, what is really affecting the body, and how to intelligently and skilfully and scientifically treat that particular part.

Q. Will you please tell us—I do not think you have yet—what are the symptoms which you look for which would be a conclusive symptom of the existence of polio? A. I would look for the commencement of shortening of the peripheral structures, that is, the skin, the fascia and muscle fibre. 938 I have a way of detecting that. There is a certain condition present in that area where the disturbance has occurred from the invasion of the disease which can be detected, and if treated in that particular stage, the patient will be saved all pain and possibly—it hasn't yet been stated by medical men but it may save the process of the disease being—it may retard the process of the disease.

Q. Then you would look for that particular symptom—A. Yes.

Q. —to diagnose poliomyelitis? A. Yes.

Q. Would you look for any other symptom besides that? A. Well, there are other conditions. There are nasal conditions and throat conditions, but this is prior to them alto- 939 gether. You see, that is the first condition I would look for, the first symptom or condition.

Q. This would be a pre-paralytic symptom? A. Yes, certainly, or the child would only feel just a little bit off color, as they say in Australia. I suppose you say it here, too.

Q. Yes, we do. We speak the same language. A. Well, that is very pleasant to me.

Q. Then supposing a child had a slight fever and you want to diagnose its condition, would you still look for a spasm, that is, this peripheral condition? A. Yes, I would look for the onset. It might be interesting to you to know

that I ha e never yet been wrong in detecting—I have seen about several thousand cases—I think four thousand—and I have not yet been wrong in detecting the parts where the disease was going to invade the body.

Q. That is, you have diagnosed the disease accurately where you found this particular condition? A. Yes. It has always developed even if the spinal fluid may be normal at the time, the particular time of my detection, but in a few days' time the diagnosis has been confirmed by the medical observer.

941 Q. When you have diagnosed a case with your method you also require a spinal tap as confirmation? A. We always have spinal fluid findings to confirm the diagnosis.

Q. And sometimes the spinal tap may not be positive? A. No.

Q. Although your finding is positive? A. Not the first—

Q. The first tap? A. But afterwards it does.

Q. It might be necessary to take a further spinal tap a day or so later? A. Yes.

Q. Until you get a positive spinal tap? A. Yes.

Q. Would you say on your theory of spasm—you see
942 our idea of spasm is a little bit different. Would you say the jumping of a muscle is a spasm to which you refer? A. No, it is not visible.

Q. It is not visible? A. Not always. Sometimes there is a fibrillation but not very frequently. The shortening is not always visible. I think that is why it has escaped the medical profession for so long.

Q. But the spasm to which you refer is not the sudden jumping of an arm or a leg? A. No.

Q. And that would not be indicative itself of the existence of polio, would it? A. No, not altogether. I wouldn't consider it so. There are fibrillations that you can see on a few patients but the shortening you see on all.

Q. And the shortening is what you refer to as spasm? A. Yes.

Q. I have a note here that early in your testimony you spoke about the symptoms that you looked for—that you looked at a certain part of the body to which the medical profession as a rule would naturally refer. Do you mean by that any particular part of the body or do you look over the whole body to find this peripheral shortening? A. The whole body—

Mr. Rassner: That is objected to. Miss Kenny did not— 944

The Court: No, I will let her testify.

Mr. Rassner: That is misquoting Miss Kenny's testimony.

The Court: I beg your pardon?

Mr. Rassner: When Mr. Gray said that the medical profession would not look for it, I do not think that such a charge should be leveled at the medical profession, and the question is improper.

A. No. Your observation was not quite accurate, Mr. Gray. My statement was that it had been taught that I had observed that that part of the body which was thought 945 to be normal was not normal at all.

Q. That is thought by the medical profession to be normal? A. All over the world. That had been taught and they were quite within their rights to remain with their teaching until scientific research proved that my clinical observations—that it was disturbed by the disease, was correct.

Q. And what part of the body is it that you refer to? A. No particular part of the body; any part that may be shortened.

Q. I see. How long in your observation does the acute stage of the disease continue? A. Well, it is supposed to

continue while the temperature is present, the high temperature is present. That varies from a few days to a few weeks, and there may be a recurrence. There may be a return of temperature.

Q. So that there should always be temperature present to have an acute stage of the disease? A. Yes. After the temperature is reduced to normal and remains normal ten days, we say the acute stage is over.

Q. But at the inception of the disease, at the onset, in the absence of temperature you would not look for an acute
947 stage of the disease? A. Yes, I would. Before the temperature starts to rise in any degree—as a matter of fact it is very rare cases where it rises very high but I would detect the onset of the disease before the temperature was present.

Q. By this peripheral examination? A. Yes, yes.

Q. But when the disease is acute it is always accompanied by— A. Yes.

Q. —a temperature which is above normal? A. Yes, as a rule.

Q. I take it you do not prescribe any specific remedy for the disease? A. You mean any drug therapy?

948 Q. Yes. A. That is entirely in the hands of the medical world.

Q. And you leave that alone? A. I leave that alone, certainly.

Q. Your method is to treat the disease and prevent deformities after its onset? A. My method is to treat the symptoms and conditions present in order to give to the patient the maximum amount of recovery and restore them as far as possible to normal existence.

Mr. Gray: Thank you very much.

Re-direct Examination by Mr. Rassner:

Q. I would like to ask you one or two more questions if I may, Sister Kenny. Is the medical profession throughout the world aware of the existence of the Kenny method of treatment? A. No, sir, they are not. I have traveled through England, Ireland, France, Belgium, Spain, Sweden, Russia, Norway, Switzerland, Denmark, Italy, and Holland, within the last seven months, and they were not aware —they were trying to do it is much as they could after this book, and telling me they were getting very much better 950
results than ever before. They were most anxious to know everything.

Q. Perhaps I did not make my question quite clear. First of all, I would like to know this: Does the medical profession know that there is such a thing, such a treatment, whether they know how to apply it or whether they know what it is? A. Yes, it is known all over the world.

Q. That is my question. A. It is known all over the world. A doctor from Turkey came the other day and upbraided me for not going to Turkey.

Q. That is the point I am making. The entire medical profession throughout the civilized world knows that there 951
is such a method as the Kenny method of treatment. A. But they do not know for what conditions—

Q. Would you mind? A. Yes, they do.

Q. That is what I mean. That is my question. A. You want specific answers.

Q. That is precisely it. A. I guess you will get them.

Q. In other words, I did not want an impression to be created that the Kenny method is so unknown that a doctor connected with the United States Navy or the United States Army did not know of the existence of the Kenny method of treatment—do you see what I mean, Sister Kenny? That they know that there is such a treatment. A. Well, I do not like legal procedures but—

952 *Elizabeth Kenny—Re-direct.*

Q. But in any event, I think you have answered my question, and it is thoroughly satisfactory as far as I am concerned, so I won't press it.

Now, I would like to know whether the fact that a man 26 or 27 years of age, having pain in his neck so that his neck is stiff, and with a pain that travels from behind his left ear (indicating) down to his neck, and that he feels nauseous, and that he feels an involuntary contraction of his arms; that he feels so weak that he cannot stand on his feet and has to be confined to his bed, that he feels as
953 if his entire body has been burned, as though he was on fire—whether that is a sufficient indication of the existence of poliomyelitis? A. Well, that would remain with the doctor, the doctor looking after the case. You see, there are many—those symptoms may be present in many conditions other than polio.

Q. I see. That you consider a medical question. A. Yes, that is altogether a medical question.

Q. That is a diagnostic question. A. Yes, and I do not do that.

Q. In any event, when a patient having polio, has the symptoms, would you consider that an early state or a late state or an acute state? A. Well, I couldn't definitely
954 say that. I wouldn't know until I saw the patient. If the patient has been complaining for a few days it certainly wouldn't be an early state.

Q. In other words, it depends on how long he has been complaining of these conditions? A. Yes.

Q. As to whether or not it is considered an early or late state? A. As a matter of fact the treatment should be right there immediately, when the diagnosis is given the treatment should be given.

Q. Do you consider ten days as the period of the acute state of the poliomyelitis? A. No, I would say—I think I have already stated that the medical world considers ten days after the reduction of temperature—

Q. As still acute? A. The acute state is over then.

Q. Has the medical profession, to your knowledge, estimated as to how long, after the muscles start to show spasm, that the condition remains in the acute state? A. No, I don't think that has ever been investigated.

Q. It has not been investigated? A. No.

Q. I was just wondering whether it has. A. I just do not exactly understand your question. What is it?

Q. Well, I wanted to know if we can start to estimate the acute state from any particular symptom? Now, if a man has symptoms of spasm or involuntary contracture of his limbs, can you estimate the acute state from that as having started before that or after that? A. Well, I could not answer that question because I don't know. 956

Q. I see. That would be a diagnostic question? A. Yes.

Mr. Rassner: Thank you.

Re-cross Examination by Mr. Gray:

Q. I noticed, Sister Kenny, that you wanted to say something more—that you would like to say something more in answer to Mr. Rassner's question about whether your system is known all over the world to all the doctors. Would you like to expand on your answer somewhat as to whether or not they know your system completely and its application? A. No, they don't know the system. They do not know it in the United States of America. As a matter of fact that has been the reason for me remaining here. I think the United States of America worthy of the very best, and I had hoped to go home to my native Australia years ago but I haven't had the opportunity of giving to every child in the United States of America my work in its entirety. I have been retarded from that, and I hope that the day will come when we could get together and do something in that direction, but my work—it is known that there is a Kenny method all over the world but the method 957

itself is not even known in the United States of America. They have a certain knowledge of it. Some doctors call it the modified Kenny method, modified to the extent of their knowledge of the treatment for the conditions discovered by me, but you see the world is a big place.

Q. Yes. A. And to say every doctor in the world knows it would be rather an exaggerated expression, I think. But it is known. We have patients in our institute from Greece, from Ireland, from South America, and applications from India, Egypt, Jerusalem—almost all over the
959 world we have had applications for patients to be admitted to our institute.

Q. The institute is in Minneapolis, isn't it? A. Yes.

Q. And your headquarters are there? A. Yes. I had hoped to be in New York but that hope has not yet been realized.

Q. I hope it will be very soon. A. Thank you.

Mr. Gray: Thank you.

Re-direct Examination by Mr. Rassner:

Q. Sister Kenny, I still would like to develop one point. The technical, the complete understanding of your method
960 is obviously unknown to each and every doctor throughout the world, but I think you told us that each and every doctor throughout the civilized world is aware of the existence of such a treatment? A. Yes.

Q. Now— A. So far as I know. I can't say definitely.

Q. Well, it is generally accepted that it is known. A. There is China and there is Japan and there is—well, I have had telegrams from Czechoslovakia and from other parts of the world, asking me am I taking part in a conference that is going to be held here in New York in July. I never heard of it until I got these telegrams from other countries asking me that question.

Q. In any event, it is generally known that the Kenny method of treatment includes the application of hot woolen

packs, isn't that so? A. Yes. Some people think that is all there is to it.

Q. Yes, but that is generally known, isn't it? A. Yes, it should be generally known.

Q. Well, from your association and travels all over the world. A. I am not behind the minds of every medical man in the world, but I think it should be generally known so far as any prominent medical man is concerned.

Q. Your observations have been that no matter what part of the world you have traveled to, regardless of how little they know about the Kenny method, even laymen know that the application of hot woolen packs is part of the Kenny method of treatment? A. Yes. 962

The Court: I think you have fully covered that.

Mr. Rassner: I am trying to bring out one point, your Honor, if I may have your indulgence.

Q. In any event, if the nurse or layman or doctor applies hot woolen packs in the early stages when the patient first takes to his bed, will that application during the first seven, eight, nine or ten days, tend to eliminate to a great measure the dangers of subsequent permanent deformities in the patient? A. It does to an extent. 963

Q. When you say it does to an extent, that is the part I am trying to bring out. That if nothing more is done but that simple, elementary practice to start with, that that is a competent producing factor in eliminating the danger of serious after effects of the disease; isn't that so? A. All medical men say the patients are much more comfortable and happy and their condition better when these packs are applied in the early stages.

Q. And your observations have been to that effect? A. My observations support the observations of medical men.

Q. That there are no after effects? A. Well, I do not say "after effects."

Q. Let me put it this way: that the chances and the reasonable expectation of no after effects— A. Of course there is quite a lot to do before you can eliminate all after effects.

Q. Yes. I was too general in my statement. But that is the generally accepted theory by the medical profession, that if that is done in the early stages, that the patient has every opportunity and likelihood of coming through the disease without any crippling after effects? A. They have a better opportunity. I wouldn't say every opportunity.

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The Court: All right. I think we have covered that.

Mr. Rassner: Yes.

The Court: Thank you very much, Miss Kenny.

The Witness: Thank you, sir.

The Court: We will take a short recess.

(Short recess.)

Mr. Rassner: May I see the Court for a moment?

(Discussion at the Bench.)

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The Court: Mr. Rassner says that he has a couple of witnesses that are not here. They were in the courtroom and they will probably be back in a few minutes. He suggests that perhaps we might go to lunch. I do not know whether that is satisfactory or not.

Jurors: Whatever you say.

Another Juror: Absolutely.

(Discussion off the record re hour of adjournment.)

The Court: We will adjourn until a quarter of two.

(Recess until 1:45 p. m.)

AFTERNOON SESSION.

FLOYD BULLIS, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Rassner:

Q. Mr. Bullis, are you presently employed? A. Yes, I am.

Q. By whom? A. New Haven Railroad.

Q. In what capacity? A. Car inspector.

Q. Now when and where were you born? A. I was 968
born in Walden, New York, on May 17, 1914.

Q. When did you first go to sea? A. I first became interested in shipping in about 1934. I quit in 1936 and returned in 1943.

Q. Did you serve in the merchant marine throughout the entire war? A. Yes.

Q. Did you serve in the war zones? A. Yes, sir.

Q. What licenses do you hold? A. Now I hold a first assistant's license for any ocean, unlimited, any tonnage.

Q. In other words, you have a license to act as first assistant engineer on any size ship in any part of the world; is that correct? A. Yes, sir. 969

Q. That license has been given to you by the United States Government, I take it? A. That is right.

Q. Now back in 1945 what license did you hold? A. I held a second assistant's license.

Q. What was your job? A. I was acting first assistant.

Q. On what ship? A. On the Edward B. Haines.

Q. By whom were you employed? A. By the Cosmopolitan Shipping Company.

Mr. Gray: I object to that as calling for a conclusion.

The Court: I will let it stand.

970 *Floyd Bullis—Direct.*

Mr. Gray: I think that should be restricted to the articles, which is the contract of employment.

The Court: By the use of the word "employed" he is merely saying that they were the people who employed him; is that right?

The Witness: That is right, yes, sir.

The Court: You say you were second assistant engineer at that time?

The Witness: I was acting first assistant engineer on a second assistant engineer's license.

The Court: Acting first?

971 The Witness: Yes, sir.

Q. What are the duties of the first assistant engineer? A. Well, they are quite numerous at times and other times they are not so numerous.

Q. I mean generally. A. Generally speaking—

Q. To take care of what part of the vessel? A. The engine room and fire room of course.

Q. In other words, you were what we call ashore the work boss of the engine room? A. That is right, sir.

Q. It was you who had to actually supervise the work, and the chief engineer was more in the nature of the directing officer?

972 A. That is right, yes, sir.

Q. But the actual work was under your—actually it was under your authority? A. That is right.

Q. Who gave orders to the men in your department? A. I did, sir.

Q. Was McAllister one of your shipmates? A. Yes, sir, he was.

Q. Had you ever met him before he joined the vessel? A. No, sir.

Q. Were you any particular friend of his? A. No, sir.

Q. Have you associated with him socially before or after his employment aboard the vessel? A. No, sir, I haven't seen him since he left us in Tsingtao, China, up until this time.

Q. What was your relationship with him aboard the ship? Was it anything other than that of a superior to an inferior officer? A. That is all.

Q. That is all there was to it? A. That is right.

Q. Do you remember his general physical appearance when he first joined the vessel? A. Well, all I could say, he looked perfectly healthy.

Q. How did he conduct himself about his work when he first joined the vessel? A. He seemed to do his work at least to my satisfaction, and I was the one that had to answer for it.

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Q. Did you ever have any complaint from anybody about his work or conduct? A. Not in the beginning of the trip, no, sir.

Q. Did he go through a physical examination upon joining the vessel? A. I assume that he did. We all were required to do that.

Q. That was the established usage and custom of the trade and the practice on that ship, is that right? A. That is right.

Q. Now, you said not at first. What do you mean by that? Did you ever have any difficulties with him? A. Yes, we did; he wasn't doing his work quite to my satisfaction and I had to receive a complaint about him.

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Q. From whom did you receive the complaint? A. From one of the firemen and water tender whose job it was to report such complaints about him.

Q. What was his name? A. John Brodowski.

Q. Was that the last witness who was on the stand? A. I wasn't here when the last witness was called.

Q. In any event it was John Brodowski? A. That is right.

Q. What was Brodowski's job? A. Brodowski was fireman and water tender on McAllister's watch. He worked directly while on watch under McAllister.

976 *Floyd Bullis—Direct.*

Q. By that you mean during the four hours that they were on duty? A. That is right.

Q. What was the practice; how many hours on and how many hours off? A. Four on and eight off.

Q. So he would work for four hours, take eight hours off, and you worked four hours, too? A. Yes.

Q. During this interval of four hours on, Brodowski would work with McAllister? A. That is right, He was the watch engineer.

Q. Where was the vessel at the time you got the com-
977 plaint from Brodowski about McAllister? A. We were at sea as near as I can remember.

Q. Between what ports? A. Between Hongkong—some place between Hongkong and Shanghai.

Q. Do you know whether it was on the voyage to Hongkong or from Hongkong? A. I believe it was on the second trip.

Q. Meaning what? A. The second time we were on, in Hongkong, on the way to Shanghai.

Q. On the way to Shanghai, coming back to Shanghai? A. That is right.

Q. Tell us the nature of the complaint. A. Inasmuch as I was the one that handled the overtime on the ship and
978 I was the one to sign that the boys got paid for it, that it was legitimate overtime, I had to OK it to see that it was legitimate, Brodowski came to me and wanted to know if he was going to be paid for doing such work that McAllister was supposed to be doing. And I questioned him. And I asked him what kind of work he meant. He explained, blowing tubes and changing filters in the hot well and so forth; and he said it wasn't his job and he didn't see why he had to do it.

So I said, "I don't see any reason why you have to do it either." He said he wanted to be paid and was I going to pay him overtime.

I said I couldn't sign that, I have to speak to McAllister about it.

Q. Was a formal charge made against McAllister that he wasn't doing his work? A. Yes, I took McAllister before the chief engineer.

Q. What was the complaint in the charge? A. That McAllister was shirking his duties and that we as other officers on the ship, we were having to take the slack that he left.

Q. That was on your way to Shanghai? A. That is right.

Q. Do you know whether or not a log entry was made of that charge? A. I don't know. It is usually customary 980
on charges of this kind that they are placed in the engineer's logbook, not in the rough book. The chief usually takes care of that. The complaint was made before him.

Q. In other words, that formal complaint would be entered by the chief engineer? A. It should be, yes, sir.

Q. Was anything done about it after that? A. Well, the only thing that the chief said, McAllister said to both of us that he didn't feel well and that he would try to do better and so forth, and the chief said let it go for the time being. That was the end of it as far as I know. At any rate, McAllister, the man didn't turn any overtime in on that. That is as far as I know about it. I didn't check any closer. 981

Q. You didn't check any further? A. I didn't go to the engine room to see if McAllister was doing his work or not. It was immaterial to me as long as the man was satisfied.

Q. Mr. Brodowski testified yesterday that he put in a claim for overtime and was paid. Do you know anything about that? A. He did put in a claim for overtime but it happened throughout the whole trip, of blowing tubes. He did assist in blowing tubes. It was overtime that was distributed by the chief engineer. And I can't recollect signing it but I understand he was paid for it.

Q. That is, for doing McAllister's work? A. It isn't

entirely all McAllister's work, but he is supposed to assist McAllister in doing this job. It is a two-man job.

Q. In any event, a part of that overtime included work that should have been done by McAllister, is that correct? A. I put it a little bit broader than that. It was work that Brodowski was actually supposed to assist McAllister in doing, it was part of his job. I mean it was unusual in the fact that they paid him overtime for it. But it is usual to have two men on the job of blowing tubes.

Q. Instead of it being a two-man job it was being done by one man? A. As far as I know it was being done by
983 one man on the job.

Q. You say that McAllister defended himself on the contention that he was not feeling well? A. He didn't feel well.

Q. In whose presence did he make that statement? A. The chief engineer's and mine.

Q. What did you or the chief do about that? A. I didn't believe him personally, I thought he was goldbricking, and I thought so for quite some time after that. And the chief evidently—I don't know what he thought, but he said to me not to worry about it, that he would take care of it.

984 Q. What is the next instance you remember with reference to Mr. McAllister's complaint of illness? A. Well, we arrived in Shanghai after that.

Q. About how many days later, approximately? A. A couple or three days later. It wasn't any longer than two or three days.

Q. Two or three days later is your best estimate? A. Yes.

Q. Tell us about that. A. Well, while we were in port McAllister didn't seem to be doing his work too well there either; but I went to him again and this time he didn't look so good. I don't know how many days it was after that. Then he didn't look too good to me and he seemed

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to have a slight stiff neck. So I asked him how he felt. He said, "Not good." We took up the slack ourselves.

Q. Who? A. The other engineers and myself. He spent quite a bit of time in bed; not much we were alarmed about, he didn't want to have nothing to do with us; we actually had no companionship before that, so I didn't see any reason why, we had one argument before that, why I should be overfriendly with him.

Q. Did you visit him in his bunk? A. I didn't at first.

Q. When was the first time that you visited him in his bunk; where was the ship at that time? A. Probably a 986
couple of days before we left Shanghai or in that period. I don't know just how many days or hours or minutes.

Q. Your best recollection is that you first visited him in his bunk a few days before the ship left Shanghai for where? A. For Shanghai, for Tsingtao.

Q. Where was Mr. McAllister at that time? A. In his bunk.

Q. What did you observe about him? A. Well, he was still very unfriendly, but he didn't look as though he felt well.

Q. What do you mean by that? A. Well, I mean he didn't want me to come near him; but we attributed that 987
to the man not wanting to be friendly. But afterwards I asked him if there was anything I could do for him, get him some coffee or anything, and he said, "No, don't bother me, leave me alone, I'll be all right." This happened on a couple of occasions and I didn't bother. I had remarked to the chief that there was something wrong with McAllister. He said, OK, let it go.

Q. Did you have any conversation with anybody else about McAllister? A. Certainly. I had it with the purser, the mate and other officers on the ship, because as I say in the beginning when we other officers talked it over we all felt he was shirking his duties in the beginning.

Q. When you became convinced that he was sick and

talked it over with the purser for the first time, where was the ship at that time? A. We were still in Shanghai, maybe a couple of days, three days before we left.

Q. This conversation with the chief officer, with the first mate, the purser, the chief engineer and yourself, all took place two or three days before the ship left Shanghai— A. Approximately so, yes.

Q. —for Tsingtao? A. Yes, to the best of my knowledge.

Q. Did you continue visiting McAllister in his room? A. Occasionally; I didn't stop too often. After all, the 989 first assistant has a lot to do on the ship. He has everybody to get—to get prepared to leave port; everything has to be in top shape.

Q. In any event you went in and saw him? A. I did. I dropped in occasionally when I walked by.

Q. Do you know of your own knowledge whether or not Mr. McAllister remained in his bunk from the two or three days before the ship left Shanghai up to the time he was taken off the ship? A. I can't say surely, sir, that he was there all the time. I know that when I saw him he was in his bunk. He could have left it.

Q. Your job was down in the engine room? A. That 990 is right.

Q. From the time that McAllister was first seen in his bunk by you did you thereafter at any time see him in the engine room? A. I can't remember that I did.

Q. What is your best recollection?

Mr. Gray: He has already given it. He can't remember.

A. I can't remember seeing him there, no, sir.

Q. Do you remember ever seeing him in any other place on the ship except in his bunk? A. No, I really don't remember seeing him any other place. The only—

Q. That is the only place you remember seeing him, was in his bunk during those three days before you left Shanghai up to the time he was removed from the vessel, is that correct? A. That is right, as near as I can remember.

Q. There was some talk about conversations as to safety measures to be followed by the seamen. Did anybody talk to you about safety measures to be adopted by you and the other seamen? A. What kind of safety measures?

Q. Any kind at all when the vessel first docked.

992

Mr. Gray: Safety measures against what?

Mr. Rassner: Against anything. Unless you want me to lead the witness.

Mr. Gray: Go ahead and lead him.

Q. Did the master call the crew together and tell you in substance that there was a polio epidemic there, amongst other diseases, and that you should be cautious about mingling with crowds and places where you ate and drank? A. The way that I recollect it is that the master, I won't say he called the entire crew together, but he did call the officers in the saloon and cautioned each one of the officers to notify our respective departments that there were certain diseases, among which was venereal disease, which was very ravaging at the time, and there was also yellow fever, cholera, and even polio was mentioned, ashore; to be careful where we ate and so forth. 993

Q. While the vessel was at Shanghai were any people brought aboard the ship other than members of the crew? A. Yes, sir.

Q. Who? A. Well, they had Chinese stevedores working cargo.

Q. Approximately how many? A. Well, I already heard the number; I really didn't know myself. As I say, approximately 25 to a hold, there was five holds, and that would make 125 men.

994 *Floyd Bullis—Direct.*

Q. Is that your best estimate? A. I would say yes sir, it is.

Q. Anybody else? A. Well, we took on passengers.

Q. Approximately how many? A. 70, 75, maybe.

Q. Who were they; who were the passengers? A. Some were truck drivers, others were mechanics; we had some civilian men. I don't know whether they were engineers or what they were, but they were going up to North China.

Q. How about visitors? A. Visitors were all over the ship.

995 Q. What was the nature of their business? A. Peddlers; they peddled their wares on the boat decks, main decks, every place on the ship they could lay them down.

Q. Tell us about the drinking water facilities on board the vessel. A. We had two drinking water fountains, but there was one in the engine room that was only accessible to engineers and the engineers were the only ones supposed to be in the engine room. The other drinking fountain was near the stewards' room in the main passageway, accessible to everybody and everyone used it.

Q. You saw them? A. Yes.

Q. What about the toilet facilities aboard the vessel? A. Each department had their own toilet and they were
996 supposed to be for the respective use of each department. But it seemed after we took on these Chinese we didn't know who you were going to find in one of them.

Q. Did the people other than the crew use those toilets? A. Yes, sir.

Q. Were there special toilets built on deck? A. Yes, there was.

Q. And the means of disposal, was that open or enclosed? A. We had a hose leading to it that flushed it all the time.

Q. And that would shoot water— A. That is right, over the side of the ship.

The Court: Over the side, but it was not on the side?

The Witness: No, it was over the side of the ship.

The Court: There was a hose leading to it or leading away from it?

The Witness: Leading to the toilet that flushed it over the side of the ship.

The Court: There wasn't anything from the toilet that was left on the deck of the ship?

The Witness: No, sir. 998

Q. Was it so built so that none of the refuse could go on the deck, could fall on the deck? A. Well, it could have fallen on the deck, I suppose. But if it was used in the right way it couldn't go on the deck.

Q. It was so built that it was over the open deck? A. That is right.

Q. How many feet of the open deck did it go over? A. Well, that I would say three or four feet. The structure was on deck.

Q. Nothing to stop the splashing of that over the deck, was there? A. Nothing that I can remember of. 999

By the Court:

Q. You have been talking about these coolies coming on board the ship, about peddlers and about truck drivers and what you call passengers, and also about these toilet facilities and about the fountain. What time are you referring to? A. About the time before we left Shanghai for Tsingtao.

Q. You were in Shanghai for quite some time and you were there twice? A. Yes, but when we left Shanghai the first time we took the truck drivers and mechanics with us to Hongkong and brought them back again. They remained with us.

1000 *Floyd Bullis—Direct.*

By Mr. Rassner:

Q. In other words, they remained with you on both voyages? A. That is right. They went from Shanghai to Hongkong and returned to Shanghai with us; but we did take on additional men when we came back, and cargo.

By the Court:

Q. How about the coolies that were working as stevedores? A. They didn't go with us, no, sir.

1001 Q. When were they there? A. They were there in the period that we were loading the ship. I can't refer to actual dates because I don't know unless I have the log-book.

By Mr. Rassner:

Q. Was it the first or second visit to Shanghai? A. On both visits. On the first visit after we discharged cargo, the stevedores, Chinese stevedores discharged our cargo, they reloaded us again when we went to Hongkong.

Q. In other words, they were there on both times? A.

1002 Both times.

Q. How about the peddlers? A. They were there on both occasions.

Q. On Mr. Gray's examination of one of the witnesses, I think it was Dr. Frant, he seemed to indicate that the voyage was similar, that is, the voyage from Shanghai to Hongkong was similar to the voyage or trip from New York to Staten Island. Is that correct? A. No, sir.

Mr. Gray: That is a misunderstanding of my question, to say the least.

Mr. Rassner: Then I am sorry. That is the way I understood it or misunderstood it.

Mr. Gray: Then you misunderstood it.

Mr. Rassner: I am sorry, Mr. Gray. That is the impression I got.

Q. Was the voyage such as one would encounter traveling from New York to Staten Island? A. I would say no, sir. We went at least 500 miles down the coast to Hongkong and back to Shanghai again.

Q. Were these Chinese troops with you all during this time? A. Yes, sir, they were, to the best of my knowledge.

Q. How many days and nights did that trip take? A. 1004
I couldn't tell you exactly; it must have been a period of a week for the round trip at least.

Q. When the vessel left from Shanghai to go to Tsingtao where was Mr. McAllister? A. When the vessel left from Shanghai to go to Tsingtao?

Q. Yes. A. When we left he was in his bunk, as I remember.

Q. Where was he when you arrived at Tsingtao? A. In his bunk.

Q. Where was he after the vessel was? Tsingtao for several days, up to the 1st of December 1945? A. Well, up until the 1st of December he was in the bunk. What days that you refer to specifically I don't know. But he 1005
was still in his bunk from Shanghai to Tsingtao when we went alongside the dock.

Q. In other words, to the best of your recollection Mr. McAllister, to the best of your knowledge, was in his bunk two or three days before you arrived in Shanghai, remained there while the vessel was in Shanghai two or three days before it departed for Tsingtao? A. No, sir, you had me wrong. Mr. McAllister was in his bunk from two to three days I would say before we left Shanghai for Tsingtao; he was in his bunk when we were in Shanghai.

Q. Mr. McAllister was in his bunk when the vessel was

on its way to Shanghai from Hongkong about three days before it arrived? A. No, sir.

Mr. Gray: He didn't say that.

Q. Then I misunderstood you. In other words he was in his bunk about three days before you left Shanghai? A. That is right.

Q. Then let me take it this way: Mr. McAllister was in his bunk to the best of your knowledge about three days before you left Shanghai and remained in his bunk during
1007 those three days; while the vessel left Shanghai, while it was on its way to Tsingtao, after it arrived at Tsingtao and until the 1st of December 1945; is that your testimony?

Mr. Gray: He didn't say that. He said whenever he saw him during that period he was in his bunk.

Mr. Rassner: May we have my question answered?

Mr. Gray: I object to it as not a proper statement.

Mr. Rassner: I will take the Court's ruling.

1008 The Court: I will let the witness answer it himself.

The Witness: I would like to hear the—

The Court: You weren't up there and didn't see him so you wouldn't know whether he was in his bunk or not.

The Witness: Well, as far as I know I would like to have the question. I am all balled up myself now.

The Court: The ship left Shanghai on the 23rd of November, that is, left for Tsingtao?

The Witness: That is right, your Honor.

Q. That would take it back to about the 20th of November that you first saw him in his bunk? A. I could even go back further than that and say I saw him in his bunk—I will take that back. I wouldn't actually see him in his bunk because most of his spare time that he wasn't working that I know of he was in his bunk, because I didn't see him, you know, ashore or anything else. We didn't see him about the ship.

Q. That was even before the 20th? A. Even before that.

Q. And for how long a period of time? A. It must have been at least eight to ten days before we left Shanghai. 1010
We didn't see much of him. But it wasn't unusual for me not to see much of him anyway.

Q. Did you pick up passengers at any other port other than Shanghai? A. Yes, sir, we picked up a passenger in Colombo.

Q. One passenger? A. Yes, sir.

Q. When was that? A. I can't recall the date when we were in Ceylon, but it wasn't any more than a month after we left New York and we picked up the man who was starting the United Seamen's Service Club in Shanghai.

Q. With that exception— A. That is the only one.

Q. —you didn't pick up any other passengers other than 1011
at Shanghai, is that correct? A. Other than that one.

Q. Was there any doctor at any time aboard that vessel? A. If there was I never saw him.

Mr. Rassner: Your witness.

Cross Examination by Mr. Gray:

Q. Mr. Bullis, will you please look on line 19 and tell me whether that is your handwriting? A. Yes, sir, it is.

Q. And your signature? A. Yes, sir, it is.

Q. And this is on Defendant's Exhibit B, the articles of the ship? A. Yes, sir.

Q. Now, you seem to have bright eyes. Did you notice this stamp at the top of this column stating, "You are being employed by the United States" at the time you signed, or were you so intent on signing that you didn't look anywhere else? A. I didn't see that because when I signed this I signed three copies of this very same paper, but I never looked at the paper. If somebody had his finger on it I wouldn't see it.

Q. You don't remember seeing that? A. I don't remember seeing that on there.

1013 Q. You don't swear that you didn't see it? A. I am not swearing I didn't see it, because if it wasn't open to my vision naturally I couldn't see it. I don't know whether it was covered. Somebody said, "Sign here" and laid three copies—

Q. That is your signature? A. Yes, sir.

Q. Among the duties of a first assistant is writing up the smooth engine log, isn't it? A. No, sir.

Q. Who does that? A. The chief engineer.

Q. Do you know the chief engineer long enough to recognize his writing? A. Yes, sir, I sailed two previous trips with him.

1014 Q. I show you Defendant's Exhibit E for identification and particularly the page marked November 29 to 30, 1945, and ask if you recognize the chief's handwriting on that page? A. That is the chief's writing, yes, sir.

Q. I notice there is a notation here, midnight to 4:00 a. m. That is midnight November 29 to 4:00 a. m. on the 30th? A. This is November 29th, this is the 30th. This is November 29th. Correct.

Q. I am just trying to straighten it out for the jury. So that this midnight to 4 a. m. would be midnight November 29 to 4 a. m. on the morning of November 30th? A. That is right.

Q. This notation here says, "Night engineer 5:00 p. m. to 8:00 a. m. second assistant." A. Yes, sir, it says that.

Q. Do you recollect whether you gave the chief engineer that information to enter? A. No, sir. I can say this, that I know on other occasions, I am not stating that this is one, that the chief engineer generally followed in chronological order; for instance, if the first was on the one night, the second was the night engineer on the next night, and third engineer was the third engineer the next night. Different ones may have taken the watch. I couldn't say who stood the night watch. 1015

Q. On the night of November 28-29, the night engineer is the third assistant? A. That is right. Generally the first assistant follows the third assistant. The chief had his own way of keeping the logbook, and he was the only one that kept it. 1016

Mr. Gray: I ask that this be marked in evidence.

Mr. Rassner: That is objected to. It is out of the case. We are making no claim of fault based on the proposition—

Mr. Gray: This is not a question of fault. I am trying to find out.

Mr. Rassner: This is incompetent, irrevelant and immaterial. Why clutter up the record, just to put something in evidence because Mr. Gray wants it in? I object to it. 1017

Mr. Gray: I want to get all the facts in the case in the record.

Mr. Rassner: I object to it. I will take your Honor's ruling. I think comments are unnecessary.

The Court: Mr. Gray is just going to see if he can't do without it.

Mr. Rassner: Very well.

The Court: Without the actual book in evidence.

Mr. Gray: Yes.

The Court: All right.

Q. Is this book kept in the regular course of business on board ship? A. Yes. That is the book that stays in the chief engineer's room. He takes care of that entirely himself.

Q. It is signed by the chief engineer? A. That is Mjoen.

Q. M-j-o-e-n, and he was a Norwegian, wasn't he? A. Yes, sir, he was.

Q. This notation of "Night engineer 5 p.m. to 8 a.m., second assistant," appears on the page for November 29 and November 30, 1945? A. Yes, sir.

1019 Q. There has been some controversy here about the number of entries in the rough engine log covering the trip from Shanghai to Tsingtao on the 23rd or the 25th of November.

Mr. Rassner: I object to the form of the question. There is no controversy. The testimony is all clear and direct. No controversy, no evidence to refute it.

The Court: All right. There is no controversy.

Q. It appears in the record that there are certain entries. Whether Mr. Rassner agrees with me is another question.

1020 Mr. Rassner: I agree with you, there are certain entries.

Q. Will you please describe to the jury the difference between a rough log and a smooth log? A. The rough log is the log that is kept daily in the engine room for reading the temperatures and the various pressures, the cylinders, and what not; in other words, the work that is done daily. The smooth log is the log that is kept in the chief engineer's room; usually he keeps it. I assume that that is what he did. He copied it in the smooth log. In other words, that is the permanent record with the ship.

Q. The smooth log is the permanent record of the ship?

A. I don't know whether it stays with the ship or goes to the shipping company. But that is the one that remains in the chief's office. That book never goes below.

Q. It is writtten in ink? A. Yes.

Q. The rough log, most of the entries there are written in pencil, are they not? A. Yes.

Q. Because they are made at the time of the occurrence? A. Then or a couple of days after. Not of course at sea. That is usually made up at port—usually at sea we make it up as we go along.

Q. At sea you make it up as the watch progresses? 1022
A. That is right.

Q. On the Haines there was the first assistant, yourself? A. Yes.

Q. Second assistant, Mr. McAllister? A. Yes.

Q. And third assistant Mr. who? A. Luman.

Q. How do you spell that? A. L-u-m-a-n.

Q. And you had a junior third? A. Yes, sir. Mr. Cavanaugh.

Q. After Mr. McAllister went ashore, left the ship on the 1st of December, the third assistant then took his place? A. Became second assistant, yes, sir.

Q. And the junior third took the place of the third? 1023
A. Yes, sir.

Q. So you had enough engineers on board, below the chief, to stand all the watches without Mr. McAllister? A. It all depends on what you mean. Before we could make Mr. Cavanaugh a third assistant engineer and qualify, as I understand it, for a watch he had to be signed on that vessel as a third assistant engineer with the powers to sign that log. No one, not just anyone signs the log. He must be a licensed officer. But before he could become, take the powers, the duties of a licensed officer, he had to be sworn before the American Consul or somebody.

Q. But he was there and he was a competent man to stand a watch? A. No, sir, not during that voyage; he

couldn't sign the log because he wasn't qualified. He wasn't a licensed officer.

Q. Outside of signing the log he knew enough to stand a watch? A. That I am doubtful of.

Q. You put him on? A. Yes. But when you are in China 12,500 miles away you have to put somebody on. You aren't going to put a coolie on.

Q. What I am getting at is this: there is nothing reprehensible about falling sick on board ship, is there? A. No, sir; it is a tragedy sometimes.

1025 Q. There was no reason why Mr. McAllister if he were sick would be required to sign the log or to make any entries in the log, was there? A. He wouldn't actually be required to do so, no.

Q. So, I don't see how it became necessary for him to actually sign the log or to make any notations about pressures and temperatures and other information on a watch which he was supposed to stand if he didn't stand it? A. Did he make those entries?

Q. That is what he says. A. I don't know whether he did or not. I haven't seen the logbook.

Q. Weren't you here yesterday when he testified? A. I was for part of the time; outside other times smoking.

1026 I want to see the logbook myself.

Q. Take a look at this (handing). Here, on—

Mr. Rassner: We don't want to waste time. I will concede it.

Mr. Gray: What?

Mr. Rassner: I will concede that he signed it, that is his signature, and that he made the entries. There is no dispute about that.

A. This is all my writing (indicating).

Q. Starting here with the entries for November 23 to 24, Mr. McAllister has identified that as his signature for

1027

the noon to 4 p. m. watch on November 23rd and this is his handwriting, in these notations of temperatures, revolutions, pressures, so forth. A. That could be. I don't know his handwriting well enough.

Q. It is not your handwriting? A. No, it is not my handwriting, no. It could be one of his watchmen, though.

The Court: For the purpose of this case he said that he recognized it as his handwriting.

The Witness: If he said it was, then it is.

1028

Q. Can you think of any reason why someone else should stand his watch and still have Mr. McAllister make those entries in his own handwriting? A. Well, I can't think of any actual reason, but the only reason, the only thing I know is that on various other occasions after this particular thing when Mr. McAllister wasn't with us, other engineers stood the watch and other engineers signed the log. I won't say it is common practice, but it has been done.

Q. But you know, don't you, that the purpose of a log-book is to have an accurate record of what occurs aboard the ship? A. That is right.

1029

Q. So that if the owner gets into some trouble later on there is a record? A. It isn't necessarily later on. That there is no trouble on that particular watch that he was on.

Q. No, you don't get my point. These logs are always turned in to the owner at the conclusion of the voyage? A. I don't know. Both of them? Both of them are turned in? One of them stays with the ship, because every ship I went aboard had the rough log on.

Q. You know the rough log is the most important log on a ship? A. Yes, sir, that has always been on every vessel I have been on.

Q. That is the log of original entry? A. That is right.

Q. You know, do you not, that the owners look to the

records kept on the ship to defend claims for personal injuries, for cargo damage, perhaps for collision that may arise on that voyage?

Mr. Rassner: That is objected to.

The Court: Sustained.

Q. Don't you know, also, Chief— A. Not "Chief." First assistant, sir, if you don't mind. That's lifting me a little too far.

1031 Q. Don't you know that the purpose of keeping a log is to keep an accurate record of what goes on, to show the name of the person who can testify to that record?

Mr. Rassner: That is objected to.

The Court: Objection sustained.

Mr. Gray: Your Honor, what I am getting at is this—

Mr. Rassner: I object to any comments.

The Court: We understand perfectly well; of course there has to be a record and it wants to be as authentic a record as possible, and the owner of the ship or the agent of the ship wants to be sure

1032 where he can find the man who made the entries. That is perfectly apparent.

Q. Can you think of any reason why the entry should be made in a logbook, for instance, on Mr. McAllister's watch in the handwriting of the man who actually stood it, if that were the case? A. I would like to have that question repeated again, please.

Q. Supposing you stood Mr. McAllister's watch on one of these days— A. That is right.

Q. —is there any reason why your handwriting should not have appeared in the rough log and your signature appeared as the watch officer on that trip? A. I will tell

you the truth, I never even took my own readings, my oiler did. That is what he was down there for. My writing won't be in the log under my own name. It would be the oiler's. But I still sign for the watch of course.

Q. You were responsible? A. That is right, I was still responsible. I was chief engineer on that ship with no license, but I was still responsible. I stood 20 hours a day on a ship, but I didn't sign the log. I wasn't standing the watches, somebody else was, and I was the licensed officer and signed my name.

Q. Is there any reason why your name should not appear on the watch that you stood even though it was Mr. McAllister's watch? A. Well, I don't know, there is probably no particular reason why, but I don't know whether I stood the watch; maybe the chief did. He had stood watches before. And somebody else had signed the log in their name and the chief was paid overtime for the watch. 1034

Q. Do you know if you stood any of Mr. McAllister's watches— A. I stood—

Q. Just a minute. We are both getting excited. A. You said it.

Q. Do you recollect whether you stood any of Mr. McAllister's watches on the voyage from Shanghai to Tsingtao? A. That trip lasted a complete year, and whose watches I stood and whose watches the chief stood and whose watches the third assistant stood I couldn't tell you now, I don't know. 1035

Q. You can't tell us what watch you stood? A. I don't know. It may have been me and it may have been the chief. I won't say that I did and I won't say that I didn't; I could have. After all, the voyage has been over two years and it was a year's voyage, and we went plenty of places after we left there.

Q. You would have no method of making the record, or, did you have a method of making the record so that you could if you were called upon as a witness a year or

so later state whether you had stood a particular watch? A. No, I wouldn't have any record of it. As long as I got the watch pay back, that was all that I was interested in.

Q. Where was the engineers' drinking fountain? A. In the engine room one would be, and the other one that we used when not on watch was in the main deck or the saloon.

Q. The engineers' drinking fountain was down below in the engine room? A. Yes, sir.

Q. And that was reserved for the engineers? A. The
1037 engineers.

Q. And the black gang, so-called? A. The black gang, yes, sir.

The Court: Where did you get your drinking water from?

The Witness: You mean drinking water—we got drinking water by making it. We took sufficient water from the States and when we needed some water we used evaporation to make drinking water.

Q. You distilled it? A. Yes.

Q. That was 100 per cent pure water? A. It wasn't
1038 good water, but it was supposed to be pure water.

Q. You had no trouble with the Chinese coolies coming down in the engine room? A. Yes, we did.

Q. They went all the way down? A. Whenever they got a chance they were all over the ship. They even slept on the ladders.

Q. Your recollection of dates is purely recollection, without any contemporaneous memorandum? A. Come again? That's too bundled up for me.

Q. Have you made any record of this voyage from which you are now testifying as to the dates that you saw Mr. McAllister in his bunk? A. I only remember he was sick when we left Shanghai; it was a couple of days perhaps before, maybe three days, I don't know.

Q. It isn't unusual to see any officer on a ship, a merchant ship, who is off duty in his bunk, is it? A. Not with me, because I spend most of my time off at sea in my bunk. 1039

Q. That is, when you are off watch— A. But I used to mingle around at mealtime anyway.

Q. You were either in your bunk or out working? A. Eating, yes, sir.

The Court: While you were in Shanghai did you go ashore at all?

The Witness: Did I? Yes, sir.

The Court: How often? 1040

The Witness: Well, I had a night watch every third night and I won't say I went ashore the other two days I was off, but I probably went ashore one day out of the two.

The Court: Did you mingle with the people there in Shanghai?

The Witness: Only where I was supposed to mingle.

The Court: You were supposed to mingle where?

The Witness: We had definite places where we were told it would be safe for us to go, and even then our safety wasn't guaranteed. But they said 1041
the best places for us would be to eat, and entertainment and so forth; the Army Canteen; I visited the Navy Officers Club there one night with a Navy lieutenant; went to various movies sponsored by the Army, and our own club there, where we could get a bottle of beer if we wanted it or other refreshments.

Q. Walking along the street to get these various places you had to pass people? A. Yes.

Q. Lots of them? A. You said it.

Q. They were Chinese coolies and people in almost every walk of life, weren't they? A. I guess so.

1042 *William B. McLeod—Direct.*

Q. These toilet facilities on the deck, did you supervise the construction yourself? A. No, sir, I only gave orders—you mean, the ship itself?

Q. Yes. A. No, sir, had nothing to do with it whatsoever.

Q. But the water that was used for keeping the stream going through to flush it was supplied from the pump in the engine room? A. Yes, sir.

Q. What size hose did you use? A. Regular standard fire hose, about 2¼ inches.

1043 Q. 2 inches in diameter? A. 2 inches in diameter. But we didn't even have nothing to do with the hose. The deck department put the hose on to begin with. That was one of their jobs. We supplied water, were responsible for the water being on deck.

Q. You kept the pump going down to the engine room all the time? A. That is right.

Q. And that meant there was a continuous stream of water running through that trough? A. That is right.

Mr. Gray: I think that is all.

(Witness excused.)

1044

WILLIAM B. MCLEOD, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Rassner:

Mr. Rassner: I will have to go over the same monotonous routine that I have with the other witnesses, so I hope you will bear with me.

Q. Where and when were you born? A. I was born in Cedar Keys, Florida, September 3, 1919.

Q. How much schooling did you have? A. Graduated high school, jigs course in jigs and fixtures in Rutgers University. I graduated service engineering school out of Wright Aeronautical in Paterson, New Jersey. I have been to maritime officers' school.

Q. Were you one of the employes aboard the vessel on which Mr. McAllister was employed? A. Yes, sir.

Q. When did you join the Haines? A. I joined the Haines July 23, 1945.

Q. Did you know Mr. McAllister before then? A. No, sir. 1046

Q. Were you friendly with him aboard the vessel? A. I spent eight hours a day working with Mr. McAllister, and I was friendly with him.

Q. I can't hear you. A. I was friendly with Mr. McAllister, yes, sir, aboard ship.

Mr. Gray: I can't hear you.

The Witness: Mr. McAllister was my officer, he was my watch officer, and we were friendly, as far as the watch. We spent eight hours a day together in the engine room.

Q. Did you go out with him socially? A. No, I didn't. 1047

Q. In other words, you worked together and as working associates you were friendly? A. Yes.

Q. And that was the extent of your friendship? A. That was the extent of the friendship. As a rule, you will find that the crew isn't friendly with the officers aboard ship. There is a little superiority there. In other words, they have superiority.

Q. It is not the general practice? A. They don't practice it.

Q. The crew mingle with themselves, the officers with themselves, and so forth? A. That is right.

Q. In other words, the companionship is amongst the

people working in the same department or the same rating, is that right? A. That is right, yes, sir.

Q. Now do you remember how Mr. McAllister appeared to you when you first saw him? A. Mr. McAllister—

Mr. Gray: When?

Mr. Rassner: I said when he first saw him.

A. —was jolly. How he appeared?

Q. Yes. A. When I first saw him—

Mr. Gray: You haven't shown when he first saw him.

Mr. Rassner: I think my question is proper.

The Court: What was your job on the ship?

The Witness: I was an oiler.

The Court: You were an oiler.

Mr. Rassner: I will reframe my question, and I will take the ruling from his Honor if it is proper.

Q. What did you observe about Mr. McAllister's physical appearance when you first saw him?

Mr. Gray: I object to it unless the time is fixed.

The Court: When did you first see him? About July 23rd or thereabouts?

The Witness: Yes, sir. I think you will find the date is on a Saturday. I went aboard the ship in the afternoon and they were having inspection, and he was working with the Coast Guard officers at that time inspecting boilers on the ship and he was—looked capable of doing his work to me, and he was doing his work at that time.

Q. Did he look sick? A. No, sir, he did not.

Q. Did you observe anything about his conduct aboard

the vessel that was different than what you ordinarily encountered with a man in his position? A. His conduct?

Mr. Gray: I think the time should be fixed.

Q. Let me put it this way: up to the time you came to Shanghai was there anything unusual about Mr. McAllister's work? A. No.

Q. Anything unusual about his attitude towards you or anybody else? A. No, sir, not at that time, no, sir.

Q. Did that attitude change at any time? A. Yes, sir, it did. 1052

Q. When? A. It changed on our voyage from Hongkong to Shanghai, on our last voyage. Mr. McAllister—before that time Mr. McAllister was rather jolly, he used to joke with us and pass away the eight hours a day down there the best that we could. It is rather hard down there eight hours. And when we were coming out from Hongkong Mr. McAllister used to sit all the while, he wouldn't say nothing to no one, and if you talked to him he didn't want to be bothered with you. He was like a person that had something on his mind. I don't know. I didn't think he was sick or anything like that at the time until he started complaining later. 1053

Q. How was his work at that time? A. His work wasn't standing up.

Q. What do you mean by that? A. Well, I know one instance that I helped Mr. McAllister put in a gauge glass which I am not supposed to.

The Court: Put in what?
The Witness: Put in a gauge glass in a boiler.
The Court: Gauge glass?
The Witness: Yes. Renew a gauge glass.

Q. Where was the vessel at that time? A. It was at sea.

Q. From where to where? A. From Hongkong to Shanghai.

Q. Was that the only incident of work that you did that he should have done? A. No. Mr. McAllister said he wasn't feeling well and he asked me to pump oil for the fuel, and I did at that time.

Q. During the same voyage from Hongkong to Shanghai? A. Yes, sir.

Q. On your way from Hongkong to Shanghai did you notice whether Mr. McAllister stood his watches? A. Mr. McAllister stood his watches, yes, sir, up to that time.

Q. Do you know whether or not Mr. McAllister at any time stopped standing his watches. A. Yes, sir, I do.

Q. Where was the vessel at that time? A. When he stopped standing his watches? I remember very distinctly when we were at anchorage—

Q. Where? A. When we were at anchorage in Tsingtao; from then on I know positive that Mr. McAllister didn't stand his watches. Before that there was an interchange of engineers, two or three different interchanges, and I don't remember whether he was standing his watches.

Mr. Gray: Will you please speak up?

The Witness: Prior to the time of anchorage at Tsingtao there had been other engineers sick on the ship and wasn't standing their watches, and I don't remember just exactly who was standing whose watch at what time there. But at the time we were anchored in Tsingtao Mr. McAllister wasn't standing his watches.

Q. I guess we can all concede that he was taken off the ship on December 1st. What I am trying to find out is, when was the first time, that is, where was the vessel when Mr. — A. I don't think Mr. McAllister stood his watches on the trip up from Shanghai to Tsingtao. To recall the

exact watch two days ago—I mean three years ago, it is pretty hard, two and a half years.

Q. Did you see Mr. McAllister in his bunk at any time? A. I did, yes, sir.

Q. Where was the vessel when you first saw him in his bunk? A. When I first saw him in his bunk, from the first occasion I wouldn't have any occasion to see Mr. McAllister in his bunk unless I knew he was sick and I would go up topside and see him. He was an officer, and I didn't hang around up there.

Q. Where was the vessel the first time you went up 1058
because you heard that Mr. McAllister was sick? A. In anchorage in Tsingtao.

Q. In anchorage at Tsingtao? A. Yes, sir.

Q. You didn't see him in his bunk while the vessel was at Shanghai? A. No, sir, I didn't. I didn't have any occasion to go up because, as I say, we don't hang around together. The question is about a man sick or something, I found out that he was sick, so I went up to see him.

Q. How many days before he left the vessel did you see Mr. McAllister in his bunk? A. We were in anchor some three or four or five days, I don't know how many days we were in anchorage—

1059

Q. What is your best recollection as to how many days before Mr. McAllister left the vessel that you saw Mr. McAllister in his bunk? A. I would say five days.

Q. That is your best recollection? A. Yes.

Q. In other words, whether he was in his bunk before that or not you don't know? A. I heard Mr. McAllister say before, we were standing watch, it was on the port watch in Shanghai, and I did ask him a question about going ashore and he said he wasn't feeling too well and he wasn't going ashore.

Q. And that was while the vessel was still at Shanghai? A. She was in Shanghai.

Q. How many days before or how many hours before she left Shanghai? A. I remember an incident I bought some silk kimona in Shanghai and Mr. McAllister liked it and I offered to take him where I bought the kimona if he wanted to buy one like it, and he said he wasn't feeling well and couldn't make the trip.

Q. How long before the vessel left Shanghai for Tsingtao was that incident? A. Two or three days.

Q. Was that the last time you saw Mr. McAllister on watch?

1061 Mr. Gray: That is objected to as leading.

A. I can't remember those watches.

Mr. Rassner: He says he can't remember, so it doesn't make any difference.

All right, that is all of this witness.

Mr. Gray: That is all. Thank you. No questions.

Mr. Rassner: No further questions of this witness.

(Witness excused.)

1062 Mr. Rassner: I expect a witness, Mr. Jackson, who is supposed to be coming in on a ship to New York and he has not arrived yet. I was wondering if I might have the indulgence of the Court to call him later as a rebuttal witness. It won't be strictly rebuttal.

The Court: I can't see any objection to that. Is that your last witness?

Mr. Rassner: That would be my last lay witness. Now, Dr. Cusack is a witness for the State of New York in a murder case on which he is actually on the stand at this moment as far as I understand before Judge Sobel, and he is due here as soon as he gets

through. So with the exception of the doctor the plaintiff rests.

Mr. Gray: I shall have some motions to make, your Honor, so may—.

Mr. Rassner: For the purpose of the motion I will concede that the plaintiff's proof is concluded.

The Court: I don't think there is much to discuss on the motion at this stage. I can deny your motion and give you an exception and you can renew it when the case is all in.

Mr. Gray: I would like to have the motion on the record. 1064

My first motion is to strike out as incompetent all the testimony offered to prove that the absence of medical care other than rest and isolation in his bunk for a period prior to December 1, 1945 of the plaintiff had no causal connection with the plaintiff's physical condition then or thereafter.

The Court: I will deny the motion.

Mr. Gray: And an exception, please.

And I move to dismiss the first count in the complaint on the grounds first that there is no evidence of the source of infection of the plaintiff's malady; secondly, that there is no causal connection between his rest in his bunk for the period prior to December 1, 1945, and his present condition; further, that there has not been shown any status of this defendant except as an agent of a disclosed principal; it doesn't appear in the record that Cosmopolitan owned the ship or was the owner of the ship pro hac vice or had any other connection with this plaintiff than through the articles, where the agent disclosed the name of his principal; and, therefore, the agent is not responsible for anything that the principal is responsible for, and the owner of the ship, 1065

whoever it might be, would be responsible to the member of the crew directly.

The Court: Denied.

Mr. Gray: Now I also move to dismiss the second alleged cause of action for maintenance and cure under the law in the Shellman case which has recently been decided by the Circuit Court of Appeals of this court.

The Court: You don't need to tell me about that case. I was reversed in that case.

Mr. Gray: I did not know that, sir.

The Court: I do not like to parade my errors, though, before the jury.

Mr. Gray: I did not do it intentionally.

The Court: It is not the first time.

Mr. Gray: I did not do it intentionally. In fact I did not look at the lower court's decision.

Mr. Rassner: May I say for the time being—

Mr. Gray: Please don't interrupt.

Mr. Rassner: I thought you concluded.

Mr. Gray: Not yet. I haven't finished my motions yet.

Mr. Rassner: I am sorry.

Mr. Gray: All right. We all make mistakes.

Under the law of the Shellman case, your Honor, the—

Mr. Rassner: I object to a discussion of the law before the jury.

Mr. Gray: Well, if you wish to excuse the jury I have—

Mr. Rassner: No; I object to the discussion of the law at this time. I assume that his Honor knows the law. And I object to a discussion of the law.

The Court: All right. There isn't anything to argue on the law in connection with that case because

I have been over it recently and I also went over it when the opinion that I wrote was written on the Shellman case, and I still think it is right. It does not have any bearing on this question though, the opinion that I wrote.

Mr. Gray: Well, my point is, your Honor—

The Court: I understand your point. But I remember exactly what Judge A. N. Hand said at the end of that opinion with respect to the Hast case.

Mr. Gray: May I have a ruling on my motion, your Honor? 1070

The Court: I denied the motion. I will deny it again.

Of course it is understood that all I am doing at this stage is to deny this motion on the question of law and I am quite willing to consider the whole thing again after all the evidence is in, when it is the proper time to do it.

Mr. Gray: And I respectfully except for the record.

The Court: You don't have to. Are you ready to go on now?

Mr. Gray: I have two witnesses on the way up.

The Court: I guess we had better take a short recess. 1071

(Short recess.)

HAROLD E. WRIGHT, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Gray:

Mr. Gray: First, your Honor, I offer in evidence a certified photostatic copy of the certificate of

registry of the S. S. Edward B. Haines indicating the ownership of the vessel in July 1945.

Mr. Rassner: I object to that. I will concede that the vessel was owned by the United States Government or the War Department.

The Court: There isn't anything else in it.

Mr. Gray: There isn't anything else—

The Court: Registered in the name of the United States?

Mr. Gray: Registered in the United States of America, represented by the War Shipping Administration.

Mr. Rassner: Does it say anything about general agency?

Mr. Gray: Nothing said in here about general agents.

Mr. Rassner: All right.

Mr. Gray: Then it is conceded that the vessel at the time involved in this suit was owned by the United States of America?

Mr. Rassner: That is correct. The title was in the name of War Shipping Administration, owned by the United States of America.

Mr. Gray: I offer in evidence an original counterpart of the general agency agreement under which the Edward B. Haines was being operated by the War Shipping administration during the time covered in this suit.

Mr. Rassner: Is this the same as the usual general agency agreement? There is nothing different here?

Mr. Gray: That is the standard form.

Mr. Rassner: No objection. I consent to it.

Mr. Gray: May I substitute a carbon copy?

The Court: No objection.

Mr. Rassner: No objection.

(Marked Defendant's Exhibit G.)

The Court: That is between the United States and the defendant Cosmopolitan Shipping Company, Inc., is that right?

Mr. Gray: Yes, sir.

The Court: It covers only the ship?

Mr. Gray: That covers every ship. I am going to give the allocation now.

Mr. Rassner: We don't have to waste any time. I will concede that the Haines was allocated to this steamship company under the—

1076

Mr. Gray: I would like to have the terms of the allocation in the record.

I offer in evidence a copy of the letter from the War Shipping Administration allocating the S. S. Edward B. Haines to the Cosmopolitan Shipping Company, Inc. under the general agency service agreement which is marked Exhibit G.

Mr. Rassner: No objection.

(Marked Defendant's Exhibit H.)

Mr. Gray: With the Court's permission I will read this letter to the jury.

(Mr. Gray reads Exhibit H to the jury.)

1077

Mr. Rassner: I would like to know whether Mr. Gray claims that there was any war risk—I am not talking of general insurance—I want to know whether he claims that there was any war risk benefits available to Mr. McAllister.

Mr. Gray: It would only be a guess.

Mr. Rassner: I can give you the answer if you want me to give you the answer.

Mr. Gray: I know he applied for it but I don't know whether he got it.

Mr. Rassner: He didn't get it and he can't get it. If there is any question about it let us have it straightened out right now. War risk insurance

applied until the hostilities ceased, and only in the event that he was injured during hostilities.

Mr. Gray: And as the result of an act of war.

Mr. Rassner: As a result of an act of war. He gets no benefit out of that type of insurance. As to the other insurance, why, of course every one knows what insurance is. It is the vessel that is insured and not Mr. McAllister.

Q. Mr. Wright, what is your calling? A. At the moment I am deputy shipping commissioner, sir.

1079

Q. As deputy shipping commissioner do you have anything to do with the signing of officers and crew on merchant vessels? A. When so assigned by the commissioner, yes, sir.

Q. Where is your office? A. 42 Broadway, sir.

Q. New York City? A. Yes, sir.

Q. How long—

Mr. Rassner: I will concede his qualifications.

Q. —have you performed such duties?

Mr. Rassner: I will concede his qualifications.

1080

Mr. Gray: No. I want to find out how long he has performed the duties.

A. I was there during the war, 1944, 1945 and '6, sir.

Q. Are you here under subpoena? A. Yes, sir.

Q. Did you bring with you your record of the articles opened on the S. S. Edward B. Haines in July 1944? A. I did, sir.

Q. 1945. Have you them there? A. Yes, sir.

Q. Will you state whether or not those records have been continuously in the office of the shipping commissioner from the time the articles were signed until you brought them here today? A. They haven't left, sir.

1081

Q. They haven't left the office? A. No, sir.

Q. Will you please open those articles and look at the top of the signature page and the signature column on the lefthand page and will you state to the jury whether or not there is anything stamped there in blue ink? A. It is stamped there, you are being employed by the United States, immediately over the signature, place of signature.

Q. At the time a crew is signed on the vessel how many of those articles are signed? A. Three, sir.

Q. And will you state to the jury whether or not those articles are identical? A. They are, sir.

1082

Q. And what is done with the three articles? A. The triplicate is kept in the office of the shipping commissioner, the original and duplicate is given to the master of the vessel until he comes back to port and pays off and clears his vessel.

Q. When he comes back and clears his vessel what happens to one of the other copies? A. The original goes to Washington; the other copy is kept and filed.

Q. I show you another paper which has been produced from your office and ask you to state whether or not that is another copy of these same articles. A. Yes, sir. That is a pay-off article.

1083

Q. These were brought back by the master? A. That is right, sir.

Mr. Gray: May it be conceded that this is the same article that has been marked Exhibit B?

Mr. Rassner: Yes.

Q. Will you please state to the jury, Mr. Wright, whether or not this rubber stamp that you have read was on those articles in its present condition at the time the articles were signed?

Mr. Rassner: If he knows.

1084 *Harold E. Wright—Cross.*

A. They were, sir.

Mr. Gray: He signed the articles himself.

The Witness: I was the commissioner that signed on the vessel, sir, yes, sir.

Q. Is there any doubt in your mind that those articles have been changed and that stamp— A. No, sir.

Q. —placed on the articles after they were signed? A. No, sir.

Q. You are positive? A. Yes, sir.

1085

Mr. Gray: Your witness.

Cross Examination by Mr. Rassner:

Q. Tell me, did you ever see a seaman, any seaman in your entire life before signing the articles actually take them and turn the pages to the first page and start reading it? Did you ever see that done? A. No, sir. They read the forecastle card, sir.

Q. Did I ask you anything about the forecastle card? A. No; the forecastle card is the same as the front of it.

1086 Q. All I want to know is what actually takes place. Did you ever see a seaman actually read— A. Yes, sir, I did.

Q. —actually take it up and read it? A. Yes, sir, before they would sign the articles.

Q. To pick up this paper which says, "Shipping Articles," and actually read it? A. Yes, sir.

Q. Did you ever see them read them? A. I have seen them look through the whole thing, even on the rules on the back.

Q. When was the first time you ever saw a seaman do that? A. That I couldn't remember.

Mr. Gray: I think it is immaterial. It is ancient history.

Mr. Rassner: You say it might be ancient history.

Q. How many years ago do you remember a seaman ever picking up these papers, articles, and reading them? A. I would say two.

Q. Two years ago? A. Yes, sir.

Q. What ship? A. On that one particularly.

Q. Who did you see? A. I couldn't tell you that. I couldn't recognize the man that I signed on that ship, sir.

Q. You say that a seaman actually picked up these papers and started reading it? A. Yes, that is right. 1088

Q. How long do you know Mr. Gray? A. I didn't even know the gentleman. I met him today for the first time.

Q. Does your business call you in contact with steamship companies very often? A. No, sir. Not unless sent out by the commissioner.

Q. Do you know anybody connected with the Cosmopolitan Shipping Company? A. No, sir.

Q. Do you know anybody connected with the underwriters? A. No, sir.

Q. Or with the insurance company? A. No, sir.

Q. You say you remember somebody on this ship? A. Well now, whether it was this ship or some other ship I 1089 couldn't tell you that.

Q. Didn't you tell us before—don't you think it is rather important to be careful about your statements? A. Well, maybe he picked it up.

Q. Didn't you tell us before that it was on this ship that you saw somebody actually— A. It may have been this one. It may have been another ship.

Q. You mean it could have been? A. It could have been.

Q. You won't testify that you saw any man on this ship look at these articles? A. No, I wouldn't swear to that.

Re-direct Examination by Mr. Gray:

Q. Will you please describe to the jury the procedure that is followed when the articles are signed on the ship? A. Well, three years ago when these articles were first opened they had three sets of articles, identical as these. We had to lay them out so the men could sign all three signatures. In other words, there was one on top of each other. We had the man sign it; the top form was the original on which all the information was filled in. All three sets were brought back to the office and completed in the office as far as the writing is concerned, the figures and what-have-you, the addresses. And that is about all there was to it.

Q. These articles were spread out on a table? A. That is right, sir.

Q. Did you put your hand over any of the columns or your hand over anything to cover anything up? A. No, sir.

Mr. Rassner: We aren't making any claim that he deliberately withheld any information from any of the seaman or wouldn't let him read it if he wanted to. It was there for him to read if he wanted to read it, but they never did.

Mr. Gray: We don't know that they never did.

Mr. Rassner: He says he can't say that any man on that ship—

The Witness: I couldn't tell you whether a man read the face of this article on that particular ship, no.

Mr. Rassner: That is right.

The Witness: That I couldn't say.

Q. As a matter of fact, any man signing the articles was at liberty to read them all through, back and forth? A. That is right. In fact, the face of the articles were read

off and the forecastle card was posted in the crew's mess and the officers' mess.

Q. What does the forecastle card consist of? A. The forecastle card is the complete replica of the front of the articles.

Q. That is, the contract of employment? A. That is right, sir.

Q. And that is— A. It is posted, there is two of them posted, one in the crew's quarters and one in the officers' quarters.

Mr. Gray: That is all. 1094

Mr. Rassner: No questions.

Mr. Gray: That is all. Thank you.

(Witness excused.)

Mr. Gray: I expect my second witness momentarily, your Honor, and then I will be exhausted for the afternoon. I would like to call Mr. Phillips.

Mr. Rassner: He is a member of the bar, isn't he?

Mr. Gray: Yes.

Mr. Rassner: I would rather not call him. Let him make the statement—

Mr. Gray: I would rather have him on the witness stand. Let us get the record correct. 1095

Mr. Rassner: You don't have to do it on my account.

EDWARD R. PHILLIPS, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Gray:

Q. Mr. Phillips, what was your occupation during World War II? A. I was in the Navy as an officer generally. I started off as an apprentice seaman.

Q. What was your rank when you were discharged? A. Lieutenant Commander.

Q. Where did you have service during the war? A. I served first on a tanker. I take that back. First I served for a month as apprentice seaman on the battleship New York. Later in the war I served in the Atlantic Ocean on a tanker, and then later again in the Pacific on a destroyer.

Q. You were executive officer? A. Yes, sir.

Q. While you were on the battleship New York did you observe the sanitary arrangements, that is, the sanitary arrangements for the crew? A. Yes. As apprentice seaman—

Mr. Rassner: That is objected to as incompetent, irrelevant and immaterial.

The Court: I don't know what the purpose is. I will permit it.

Q. You heard the testimony here about the type of sanitary arrangements, temporary sanitary arrangements that were built on the Edward B. Haines? A. I have.

Q. How did they compare with the sanitary arrangements on the battleship New York?

Mr. Rassner: That is objected to.

The Court: The temporary arrangements?

Mr. Gray: Yes, sir. How did they compare with the permanent arrangements on the battleship New York?

The Court: Let him first tell what was on the battleship New York.

Mr. Rassner: If your Honor please, I think that is immaterial. I object to it. I don't see any relevancy, and it might be prejudicial.

The Court: He is called as an expert on toilet arrangements.

Mr. Rassner: I will concede that he was an expert. But I object to it.

Q. Will you please describe the sanitary arrangements on the battleship New York as you observed them?

Mr. Rassner: I have conceded he was an expert. Now we need not go into the arrangements on the battleship.

The Court: Let him comment on the toilet ar- 1100
rangements that were on this particular ship, namely, the Haines.

Mr. Rassner: That is different.

Q. What were the toilet arrangements on the battleship New York as compared with the toilet arrangements on the Edward B. Haines?

Mr. Rassner: I thought your Honor sustained my objection.

The Court: No. I said not comparing them. I say, he can testify as to what his opinion is with 1101
respect to the toilet facilities on the Haines, as the testimony indicates here in this case.

A. Well, in my opinion, as I have heard the testimony, the sanitary arrangements although temporary in nature which were on the Edward B. Haines were as efficient and as healthful—

Mr. Rassner: That is objected to.

The Court: Sustained.

Mr. Gray: He is an expert.

Mr. Rassner: Nevertheless his Honor is an expert on the law. My objection is sustained.

The Court: We are not talking about the lay here.

Mr. Rassner: Mr. Gray was finding fault with the objection to it. I am taking the ruling from the Court.

The Court: We are talking about sanitary arrangements. As we call them, the toilet facilities. I suppose that is what you mean.

The Witness: I say first that the toilet facilities on the Edward B. Haines were similar in nature—

Mr. Rassner: I object to that.

The Court: Yes.

Mr. Rassner: We are not interested in any other ship or a comparison with any other ship.

The Court: All right.

The Witness: Well, if I am qualified as an expert, I say that from the testimony the temporary toilet facilities on the Edward B. Haines were sanitary.

Q. Will you please describe the sanitary arrangements on the battleship New York?

Mr. Rassner: That is objected to.

The Court: I will let him do it.

Mr. Rassner: If the Court please, I press my objection.

The Court: All right. You can cross examine him afterwards.

Mr. Rassner: I would rather not cross examine him at all. I don't intend to.

The Court: All right.

Mr. Rassner: I object to it. I don't see why a comparison should be made.

The Court: I don't think there is any comparison—however, I will permit him to do it.

Mr. Rassner: Very well.

1105

A. On the battleship New York and on the destroyer Bailey there was a trough arrangement for the crew's facilities similar to that described in the testimony erected as a temporary arrangement on the Edward B. Haines.

Q. Those were permanent? A. Those were permanent fixtures.

Q. And the Bailey is the destroyer upon which you served? A. I served on the Bailey for 37 months.

Q. You were actually in service on board the battleship New York?

1106

Mr. Rassner: I thought he said that before.

A. Yes.

Mr. Gray: That is all. Cross examine?

Mr. Rassner: Not by me.

Mr. Gray: Thank you, Mr. Phillips.

(Witness excused.)

Mr. Gray: My witness was supposed to have been here before half-past three, your Honor. He still has 3½ minutes to go.

The Court: I think we will accommodate him to the extent of 3½ minutes.

1107

WILLIAM J. DARCY, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination by Mr. Gray:

Q. Mr. Darcy, what was your occupation in 1944 and 1945? A. I was employed by the United States War Shipping Administration.

Q. Where were you stationed during those two years? A. The New York headquarters of the Atlantic Coast Director's office.

Q. What was your title at that time? A. Manager of Army and Navy Services.

Q. Are you familiar with the movements of the Edward B. Haines in 1945 in general? A. Generally, yes.

Q. Under whose direct control was the Edward B. Haines from the time she left New York in July 1945 until her return?

Mr. Rassner: Objected to.

The Court: If you know.

Mr. Rassner: I object on the ground that it calls for a conclusion. We have no evidentiary facts. It is simply a conclusion.

The Court: If he knows I will permit him to testify.

A. I believe that at the time mentioned she was under the direct control of the United States Army. The vessel was owned by the United States Government through the War Shipping Administration and allocated by them for the purpose of carrying U. S. Army cargo or property as the case might be.

Mr. Rassner: If the Court please, we have in evidence a general agency agreement which sets forth the terms under which this vessel was operated, and I think that that is the best evidence.

The Court: I think that is entirely correct, but I am not at all sure we need testimony as to what the character of operation was. It seems to have run through the whole testimony without anything direct.

Mr. Rassner: I ask that this testimony be stricken out.

The Court: No. I will let it stand. It is perfectly obvious—

Mr. Rassner: Between the owner and the operator the terms of the contract control.

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Mr. Gray: As far as the contract goes.

Mr. Rassner: Any dealings inter se between the owner and the defendant herein is a matter which is governed by the general agency agreement and the letter of allocation. But my contention is that that in no way is binding on the plaintiff. However, that is my position as to the law. It is not a question that I care to argue on the factual basis.

The Court: I understand.

1112

Q. What were your duties, Mr. Darcy, in 1945 at 45 Broadway with respect to the operation of vessels such as the Edward B. Haines? A. Well, my duties were to carry out on behalf of the Atlantic Coast Director of the War Shipping Administration the assignment of vessels that were assigned by the Director of Allocations of the War Shipping Administration in Washington to whatever purpose and for whatever job, so to speak, that they may have been assigned to. Carrying out my job was to direct the general agents of the administration as to the employment of these ships while they were under jurisdiction of this district.

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Q. And after the vessel left the jurisdiction of this district, under whose control did that fall? A. Under the jurisdiction of the Regional Director or Area Director as the case might be of the area to which the vessel was confined.

Mr. Rassner: May I have one general objection to all this testimony.

The Court: Yes.

Mr. Rassner: On the ground that the general agency agreement speaks for itself and it is binding on the defendant as between it and the United States.

The Court: I understand.

Q. When you speak of an Area Director, to what Area Director do you refer? What was the organization? A. Well, the War Shipping Administration being the operating agency of the United States Government was subdivided into areas and regions and districts. Domestically we were divided into districts. As far as foreign operations are concerned, we were in areas and regions, and each of those areas and regions had a Director, and under that Director there were other employes, such as myself, who had individual duties. Now, as the ship reached those areas the
1115 vessel was under the immediate control of the Director for that area through his port representative or district representative as the case might be.

Q. In the case of Shanghai was there any representative of the War Shipping Administration there with power to control the movements of the Edward B. Haines while in those waters? A. I believe so, but I can't say it with any degree of assurance.

Q. Do you know whether there was a War Shipping Administration agent there? A. Yes, there was.

Q. By the way, do you know where Captain Ray Leavitt who was the master of the Edward B. Haines on that
1116 voyage is now? A. Captain Leavitt right now I believe is the master of the William Terry Howell. He is at sea bound for Europe. He probably will not be back in the United States until the latter part of March.

Q. Will you state whether you know where the chief engineer of the Edward B. Haines is, at that time a man named Mjoen? A. I think he is in a vessel called the William Paca at the present time.

Q. Do you know where she is bound for, where she is? A. She is now either in France or about to leave there and will be back here, oh, about the 20th, 25th of February.

Q. You no longer are connected with the War Shipping Administration, are you? A. I am not.

Q. By whom are you employed now? A. Cosmopolitan Shipping Company.

Q. What is your position there? A. I am manager of chartering and agencies.

Mr. Gray: You may inquire.

Cross Examination by Mr. Rassner:

Q. Mr. Darcy, Mr. Leavitt is domiciled in New York City, isn't he? A. I beg your pardon?

Q. Captain Leavitt is domiciled in New York City, isn't 1118
he? A. I couldn't tell you that.

Q. He ships out of New York City? A. Not always. Occasionally he does.

Q. What ship do you say he is on? A. I believe in the William Terry Howell.

Q. Where did that vessel ship from? A. She last sailed from Baltimore.

Q. Did she touch the port of New York? A. No, she did not.

Q. You say you don't know where Captain Leavitt resides? A. I don't.

Q. Do you know how many times he has been in New 1119
York since December 17, 1946? A. No, I couldn't tell you that.

Q. Do you know when Captain Leavitt was last at Baltimore? A. Oh, within the last ten days.

Q. Within the last ten days he was at Baltimore. How long had he been there, do you know? A. Oh, perhaps a week.

Q. And are you acquainted with the fact that in our Federal trials a deposition can be had of a witness such as Captain Leavitt in any part of the world and read to the jury? A. I am aware of it, yes.

Q. Do you know of any reason why Captain Leavitt's testimony was not taken or why he did not appear in court here in this trial? A. I do not.

Q. Now do you know that Chief Engineer Mjoen lives in Brooklyn? A. I do not.

Q. Do you know he left within the last fourteen days?

Mr. Gray: He left where?

Mr. Rassner: Left New York City.

A. No. Chief Engineer Mjoen is in the William Paca and he is gone from here, oh, at least a month.

Q. Wasn't it two weeks ago that the Paca left? Well, all right, your information is probably more accurate than mine. In other words, a month ago that vessel left? A. That is right.

Q. Where did she leave from? A. Hampton Roads.

Q. Where is that? A. Norfolk.

Q. Norfolk, Virginia? A. That is right.

Q. Do you know how long the vessel was there before she left? A. 72 hours perhaps.

Q. Do you know how many times Chief Engineer Mjoen was in New York during the last two years? A. I do not.

Q. Do you know that the rule such as taking his testimony applies to him just the same as to any other witness; is that right? A. That is correct.

Q. Do you know of any reason why he has not been here for this trial? A. No, I do not.

Q. You are acquainted with the general agency agreements, aren't you? A. In a general way, yes.

Q Didn't you have something to do with general agency agreements and the terms of the agreements? A. In what respect?

Q. In controlling the movements of the vessel. A. No, none whatsoever.

Q. Did you have anything to do with the manning of the vessel? A. None whatsoever.

1123

Q. Did you have anything to do with the supplies of the vessel? A. No, sir. I assume you speak now in my capacity as an employe of the Government.

Q. Yes. Do you know or can you explain to us what is meant by that part of Article Seven of Defendant's Exhibit G which says, as follows, "To the extent not recovered from insurance the United States shall also reimburse the general agency for all crew expenditures accruing during the term thereof in connection with the vessels hereunder"?

Mr. Gray: That is objected to as a conclusion of law and is invading the prerogative of the Court.

1124

The Court: Objection sustained.

Q. What do you understand that to mean?

Mr. Gray: That is immaterial and irrelevent.

The Court: The same ruling.

Q. Was there a general accepted meaning by the trade, by the shipping trade, as to the meaning of that particular language?

Mr. Gray: The same objection.

The Court: The same ruling.

1125

Q. Can you tell us—and will you please wait until we get a ruling—what is meant by the following sentence, "Including, without limitations, all disbursements for or on account of wages, extra compensation, overtime, bonuses, penalties, subsistences, repatriation, travel expense, loss of personal effects, maintenance and cure, vacation allowances, damages or compensation for death or personal injury or illness and insurance premiums"?

Mr. Gray: The same objection.

The Court: The same ruling.

Mr. Rassner: No further questions.

Re-direct Examination by Mr. Gray:

Q. As far as you know, Mr. Darcy, did Cosmopolitan have anything to do with the control of this vessel after she left the City of New York, or the port of New York? A. No, sir.

Mr. Rassner: That is objected to.

The Court: I will let him testify.

A. (Continuing) No, sir.

Q. She had nothing to do with it? A. No, sir, no control whatsoever.

Mr. Gray: Thank you, Mr. Darcy.

(Witness excused.)

Mr. Gray: I have three witnesses who will be ready the first thing in the morning, that is, one will be here about half-past ten, and then we can go on.

The Court: We will go on tomorrow at half-past ten.

Mr. Rassner: I might say this to the Court: If you care to, I can check with Judge Sobel's part and find out if Dr. Cuscak has left there and is on his way down here. It does not make any difference to me. Whatever the Court says.

The Court: I don't know. I don't think he has left there.

Mr. Rassner: Maybe not. Whatever your Honor says.

(Discussion off the record.)

(Adjourned to February 6, 1948, at 10:30 a.m.)

1129

New York, February 6, 1948, 10:30 a.m.

Trial resumed.

Mr. Gray: Shall I proceed, your Honor?

The Court: Yes.

Mr. Gray: Dr. Stimson, will you please take the stand.

1130

PHILIP M. STIMSON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Gray:

Q. Dr. Stimson, are you a duly licensed physician, licensed to practice in the State of New York? A. Yes.

Q. Will you please tell the Court and the jury what your professional background has been from the time you went to medical school up to the present time? A. That is a long story.

1131

Q. Well, you can make it as brief as possible but still cover the ground. A. Well, I had three years of hospital internships, and residencies at the New York Hospital and in St. Louis, and two years of service in the other war, the first World War, some of which was with contagious diseases. Since 1919 I have been practicing in New York City.

I have been on the staff of the Willard Parker Hospital, which is the municipal hospital for contagious diseases, since the fall of 1919.

I teach at Cornell University Medical School, and am in charge of contagious diseases for that hospital and medical school.

I started and am the director of the demonstration in-

fantile paralysis service at the Knickerbocker Hospital, which the National Foundation has instituted as a demonstration service for instruction.

I think that is enough.

Q. Whom do you instruct? A. We instruct doctors who come in from all over the country and nurses and physiotherapy students.

Q. You are the director of that unit? A. Yes, sir.

Q. Where did you get your medical degree? A. Cornell Medical College in 1914.

1133 Q. And from there you went to the Army in the first war? A. I went to the New York Hospital for two years internship and then one in St. Louis and then went in the Army.

Q. What has been your experience in the care of polio cases, if any? A. I first saw cases to a considerable extent at the Willard Parker Hospital in 1935 when there was a large epidemic in New York and we had some fifteen hundred cases in the hospital that summer.

I was in charge of the service part of the time. Then for many years I was in charge of the service until two years ago when I started this other service, and I did not

1134 have time to go on at the Willard Parker.

I might say at this time that in 1941, I think it was, I started as close an imitation as I could of the Kenny treatment at that hospital, and was the first one in the East to start the Kenny treatment, and we did as good a job of it as we could, but we found that it was part of a general treatment.

Q. At the Willard Parker? A. At the Willard Parker, I saw, oh, well over a thousand cases during all those years.

Q. Are you now treating and caring for polio cases? A. Oh, yes. I have just come from the Knickerbocker Hospital this morning.

Q. Where is your office? A. Across the street from Barnard College.

Q. That is up in— A. In University Heights—Morningside Heights, on Claremont Avenue.

Q. Now have you read the transcript of the testimony of Dr. Frant which I sent you? A. I have.

Q. Are there any statements in there which you think need further clarification for the benefit of the jury?

Mr. Rassner: Well, I object to the form of the question.

The Court: I think probably it is objectionable. I am wondering if we wouldn't shorten matters by letting him testify. 1136

Mr. Rassner: Yes. I withdraw my objection.

The Court: All right.

A. Yes, I have a number of opinions. I understand I am here to give my opinion.

Q. Based upon your experience. A. Based upon my experience, and I am also to give the evidence on which my opinions are founded.

Q. Have you made any notes which you might use? A. I have some notes.

Q. Will you please refer to them. We want to make it brief but as complete as possible. A. Surely (producing notes). In the first place, as to the ease of diagnosis of the disease polio—poliomyelitis or infantile paralysis, is very variable in its manifestations. It takes many different forms, some of which are very easy to diagnose and some are very difficult. As a matter of fact, articles published by the staff of the Willard Parker Hospital have shown that ten per cent— 1137

Mr. Rassner: Now I object to that, what other people have done.

The Witness: This is supporting my opinion. May I give the reasons for my opinion?

Mr. Rassner: I press my objection.

The Court: We did that yesterday, and we have done it before to a large extent, quite fully with other people.

Mr. Rassner: Yes, your Honor.

The Court: I think probably you are right.

Mr. Rassner: I think I am. I press my objection.

The Court: What is that?

Mr. Rassner: I think I am, and I press my objection very seriously.

Mr. Gray: Well, we permitted Sister Kenny—

Mr. Rassner: I object to any argument.

The Court: Are those documents published?

The Witness: They are published documents.

The Court: Do you have them?

The Witness: No, I haven't got them with me. Some of them I do.

The Court: You mean they are printed reports?

The Witness: Yes, medical articles that have been published. I can give the names of the authors in the medical literature.

Mr. Rassner: I have no opportunity to cross examine. I would like to object to it.

The Witness: I would like to quote these as to the reasons I have formed my opinion.

Q. Doctor, I think it may not be necessary. A. All right.

Q. Because you know what your opinion is. A. All right, I will go on then.

Q. And if Mr. Rassner wishes to find the basis upon which your opinion is expressed, then you may refer to your authority. A. All right. I will say that I am reliably informed that ten per cent of the cases that have been sent into the Willard Parker Hospital—

1141

Mr. Rassner: That is objected to.

The Court: I will let him testify based upon his experience.

Mr. Rassner: He starts off with "I have been informed."

The Witness: I have also seen those cases.

Mr. Rassner: Now that is different.

The Court: You are in contact with the Willard Parker Hospital from day to day constantly, and you have been for some time?

The Witness: I have, yes.

1142

The Court: I will let him testify.

A. (Continuing) That ten per cent of the cases sent into the hospital as poliomyelitis have not been poliomyelitis on subsequent examination, so that I know that the disease is not one which is at all times easily diagnosed.

We have on our polio service at the Knickerbocker Hospital at the present time a child that was sent in to me as poliomyelitis, and which I thought was poliomyelitis for the first week that it was in the hospital, and I now know was not poliomyelitis. It is an extremely difficult—at times an extremely difficult disease to differentiate from some other disease.

1143

Q. What other diseases are apt to be confused with it, Doctor? A. Tubercular meningitis for one, a disease called lymphacitic chorio meningitis. I know that two patients were sent into the Willard Parker Hospital with broken thighs, diagnosed as polio because they had pain in their extremities and couldn't lift their legs. There are forty different conditions, I know, for which people were sent into the Willard Parker as polio and they did not have polio. The commonest incorrect diagnosis is influenza, the commonest one, because in that condition people get headaches and sometimes pain in the neck and back; they have fever and they vomit and they think they have poliomyelitis. That is the commonest incorrect diagnosis.

1144 *Philip M. Stimson—Direct.*

Q. In other words, is it correct to say that the symptoms of influenza many times are parallel with those of polio? A. For the first day or so.

Another point of confusion had to do, in my mind, with the incubation period. This is the time elapsing from the exposure to the onset of ill health, not to the time that the patient goes to bed. And while in my experience it has been most commonly twelve or thirteen or fourteen days, I know that the medical literature has given it a longer possibility, very much longer—

1145 Mr. Rassner: Now I object to that.

The Court: No, I will let that stand.

Mr. Rassner: He is talking about what other people have done and I have no chance to cross examine.

The Court: You can ask him about the literature that he is referring to.

Mr. Rassner: Well, I would rather not. I am not qualified. He puts my client at a disadvantage.

The Court: I will let it stand.

Mr. Rassner: I may be qualified to cross examine Dr. Stimson, but I am certainly not qualified to cross
1146 examine him on his claims as to what other literature sets forth.

The Court: If you want me to ask him that question I am quite willing to do it. What literature are you referring to, Doctor?

The Witness: The general literature on the subject of poliomyelitis. I have a bibliography at home of 8300 articles on the subject of poliomyelitis written up through 1944. I admit I have not read more than a tenth of that. Nobody has read it all.

Mr. Rassner: I certainly am not qualified—

The Court: Can't you take a standard work, such as Dr. Lewin—is that his name?

Mr. Rassner: I have a standard here which I consider pretty good, "Common Contagious Diseases," by Dr. Stimson.

The Witness: What edition is that?

Mr. Rassner: 1940 edition.

The Witness: Well, that is two editions old.

Mr. Rassner: That is a pretty good authority.

The Witness: That is two editions old—no, one edition old. The current edition is 1947, which I have with me. Would you like to see it?

Mr. Rassner: Certainly. 1148

The Witness: All right.

Mr. Rassner: But I certainly object to going into four thousand other reports.

The Witness: Well, may I read from my own book what it says about the incubation period?

The Court: We would rather have you tell us in your own language instead of reading it.

The Witness: Well, it can be as short as five days and it can be eighteen or nineteen or twenty days.

Mr. Rassner: May I take advantage of Dr. Stimson's offer to read his book?

The Witness: May I find it for you, the incuba- 1149
tion period? Here we are (indicating). It is a short paragraph at the bottom of page—

Mr. Rassner: Is it different from your 1940 edition?

The Witness: I don't know. I don't remember (handing book to Mr. Rassner).

Mr. Rassner: Thank you.

The Witness: There it is at the bottom of the righthand page.

(Mr. Rassner examines book.)

The Witness: I think it might be read out loud.

Mr. Rassner: You haven't changed that.

The Witness: I haven't changed that?

Mr. Rassner: No.

The Witness: Good for me. There is much in that chapter that is changed, however, practically a new chapter.

Q. I take it, Doctor, that the knowledge of polio is gradually increasing from day to day? A. Oh, very much so, and no one person can keep up with it all.

Q. Do you know Dr. Frant? A. Yes, personally, I like to consider him my friend.

Q. Do you know what his duties consist of generally? A. At the present time he is a very able administrator in the Department of Health, Deputy Health Commissioner, I believe.

Q. Do you know whether he is a technician? A. What do you mean by a technician?

Q. A man that goes into the field and makes his diagnoses and spinal taps. A. I think that is an incorrect use of the word.

Q. It is very possible. A. I think you mean a diagnostician.

Q. Diagnostician. A. Diagnostician is I think what you mean, one who goes into the field and diagnoses.

Q. Do you know whether he does that at all? A. I presume not. I do not know that for a fact because as an administrator in the Health Department he would not do that. There is a special division in the Department of Health which would cover that, of which he used to be an executive some years ago.

Q. Now to get back to the subject of polio— A. May I add about Dr. Frant, while I know him and admire him very much, I do not know that he has ever been connected with the Willard Parker Hospital. I have been there since 1919 and in that period I do not know of his having been connected with the hospital.

Q. And that is the hospital for contagious diseases in this city? A. In this city, yes.

Q. Can you tell the jury, please, what effects may be expected from various dosages of polio or virus— A. I think I understand what you mean if I may take it up at that point. Poliomyelitis, as we now understand it, is a very common infection and an extremely contagious disease, similar to measles and chickenpox, and probably most commonly transmitted in the same manner that measles and chickenpox are transmitted, that is, in contact with a person that had that disease or a person who is carrying 1154
the virus in the secretions of the nose and throat.

The commonest result of such an exposure is nothing that the patient knows about. Of this honorable jury it is probable that half of them have had a polio experience and they do not know it if they have lived where there has been polio. They have probably in their day passed the virus in their stools and there is good evidence to support my opinion on this point. That is far and away the commonest result when one is exposed to the poliomyelitis—far and away the commonest result.

The second result that may occur when one is exposed to the virus is sometimes incorrectly called abortive polio, because there is no way of diagnosing it as polio. We 1155
prefer to call it a characteristic minor illness, and we can prove there is such a result because if there is a recognizable case in a family and we question the family about the other children in the family,—there are perhaps three or four—we will very commonly find that those other children have had some minor illness at the same time as the child who developed clinical polio, came down with the recognizable disease, and it has been shown that these patients are passing the virus in their bowel movements, and subsequently it has been shown in their blood. They have developed a resistance to that—technically it is called neutralizing anti-bodies, but that means a resistance to

the poliomyelitis virus, so that it can be shown later that they have had the infection of the poliomyelitis but they themselves do not know it.

A third form that the infection can take—and these are in descending order of frequency—is what is known as acute poliomyelitis without paralysis, a recognizable form of the disease if a doctor is alert, but a form which is commonly overlooked.

This is characterized by evidence of an acute infection of the central nervous system, fever, headache, vomiting,
1157 some stiffness of the neck and the back and the muscles in the back of the thighs, which are called the ham-strings; and if a lumbar puncture is done it shows an abnormal spinal fluid. But there is no single diagnostic symptom or sign or test that will prove any one case has got poliomyelitis. The diagnosis always has to be made on circumstantial evidence, and a compilation of the evidence, and then rarely can we say—then it is only a presumptive diagnosis unless there is pretty good evidence of muscle weakness.

Now the fourth thing that can happen when one is exposed to the virus is acute poliomyelitis with paralysis,
1158 but that is a compartively rare occurrence, considering the hundreds of people who are exposed to the virus and who do not have that. I might estimate it that for every one such paralytic case there are one or two or maybe three acute poliomyelitis without paralysis, and perhaps eight or ten characteristic minor illnesses.

And a hundred or more people who pick up the virus and never know it. In other words, the patient who develops paralysis is a comparative rarity, considering the number of people who are exposed constantly.

Now along that same point I would like to say that in the disease, when the virus hits us, it does not hit primarily the muscles themselves. The virus, as I understand it, has never been found in muscle tissue. It enters

us through the nose and throat. It may go on down the alimentary canal and be excreted in the bowel, or it may break through the lining of the alimentary canal, including the nasal pharynx, and it travels along nerves, but it has never been found in the lymphatics, which has been stated. It goes to the central nervous system and there it primarily attacks pretty much the whole central nervous system, but its most notable features are where it hits the motor nerves in the spinal cord that give nerve supply, enervation to the muscles. Some of these it kills, some it makes sick, and some it does not touch. The relative 1160
proportion varies enormously from patient to patient and muscle to muscle. There are thousands of individual nerves that go to any one muscle. A patient may have five per cent or ten per cent killed and never know it, because the other ninety or ninety-five per cent can do the whole job.

On the other hand, 95 per cent may be killed, 5 per cent may survive, but it is so little that the patient doesn't know it at the time. He finds that out later that he has got a little still there.

Now if that is all there was to poliomyelitis there wouldn't really be any need for doctors or nurses because we have no medicine, no drug, no chemical, no serum that 1161
we know at the present time will in any way affect the life or death of those motor nerves. I wish we did have, but we haven't got anything whatever that we know that will bring a dead nerve back to life. It is dead, and the muscle fibres that it supplies are dead, and nothing is going to bring them back to life that we know at the present time; but there is more that happens in poliomyelitis than what happens to these dead nerves.

Some are killed, some are temporarily sick, and they are going to get well or they are going to die. We are not sure yet whether we can do anything to affect those sick nerves. There are differences of opinion on that.

Some of us think that it is well to give certain solutions intravenously. Others, such as the group at the University of Minnesota, do not agree with that. Some of us think it best to give a lot of oxygen early in the disease to make sure that those nerves have plenty of oxygen. Others do not agree with that, do not think particularly of oxygen, that they get enough oxygen otherwise; but there is nothing that we know at the present time which will affect—definitely know at the present time which will affect the health of a nerve cell in the spinal cord.

1163 Certainly putting hot compresses on an arm or a leg has no influence whatever on nerve cells in the spinal cord.

Now there are other things that happen in polio besides life or death of those motor nerves, and one of them is what is commonly called a spasm. It is a poor term because most people think of spasm as a cramp such as a person gets when they go in swimming in cold water, but if we will use the term as muscle shortening, or increased muscle tightness or tension, if we think of it in that form as a chronic condition, not as an acute pain. I like to use "spasm." We must know what we are talking about. Now spasm does occur in poliomyelitis. The causes of it are not clear. They probably are very numerous. Some

1164 of the causes are due to pathologic changes in the spinal cord, definitely. We know that because if you cut a nerve that is going to a muscle you do not have spasm in that muscle. It is flaccid, it is limp. There is no spasm in a muscle where the nerve—if the whole trunk is cut, so the spasm comes from something in the spinal cord. How that can be caused we do not need to go into here because it is elaborate and there is not entire agreement on it.

But there are some clinical features which aggravate or mitigate spasm, and those that aggravate it are nervous tension and worry. Anybody who is worried lies in bed tight, rigid.

Another one that aggravates it is pain. If you have

an inflammation in the bursa in the shoulder (indicating), all the muscles around the shoulder get tight, protective mechanism. Another cause is the change in temperature. A thuderstorm blows up and all the patients in the ward are tighter than they were before-hand.

Another is rough handling. There are a lot of clinical causes for this tight muscle.

Now there is some confusion in the testimony as to where spasm occurs and when and under what circumstances. Now a spasm occurs in three different circumstances. In the first place, it occurs in patients in the 1166
absence of any muscle weakness at all, as in those patients we have what we may call acute poliomyelitis without paralysis. These patients have spasm in the neck and the back and the hamstrings usually, and some doctors treat cases like that where there is no weakness, by resting in bed and comfort and nothing else, and the spasm clears up of its own accord in a variable length of time. Certainly the mere presence of spasm—there is no evidence that the mere presence of spasm in a muscle, if left untreated, is going to lead to weakness of that muscle.

A second circumstance under which spasm occurs is in a muscle that is also weak, such as the diaphragm with 1167
which we breathe, together with other muscles.

Now when the diaphragm is weak it practically invariably is also tight—practically invariably, and the tightness causes more trouble than the weakness, and because the diaphragm is helpful for breathing, treatment for the spasm is quite important so as to release it soon.

The third place where spasm occurs is not in the muscle that is weak, but in its opposing muscle, which I think has been brought out, and there if that muscle is weak and this one is tight—the biceps is weak and the triceps is tight (indicating), even if the biceps were normally strong it would have trouble contracting against those tight triceps, and if it is weak, it is doubly strong. It stands to

reason then before we can do very much with a weak biceps we have got to relax the tight triceps so that the biceps can act unhampered, and that is one of the important things we do in the comparatively early treatment of poliomyelitis.

We try to what we call release the patient so that we can then act on these weakened muscles and train them to do a better job.

Now there are a number of ways by which we can relax spasm. Moist heat is comforting to the patient. It relieves pain and insofar as pain is a cause of spasm moist heat is probably beneficial. Our patients prefer that they have their moist heat in the form of a hot tub rather than in the form of hot packs. They say they get more benefit from the hot tubs and it is easier and very much more comfortable than the hot packs.

Spasm can also be relaxed with various drugs. Some spasm will clear up of its own accord but so far as I know there is no evidence that allowing spasm to persist in a muscle will increase the weakness of that muscle. The weakness is dependent on the nerve supply which originates in the central nervous system.

Now—well, I have a lot more things to say, but you had better ask me questions. I am trying to put this as clearly as I can.

Q. Well, we have covered a lot of ground in a very short time. Now we have a case here, on the facts in this case, the plaintiff who is now clearly paralyzed in both legs—

Mr. Rassner: And the left arm.

A. And the left arm added.

Q. He has had some paralysis in the left arm but he can use it—he was taken ashore at Tsing Tao in China on December 1, 1945. He says that he first felt spasm or pains in his muscle on the 28th of November—

1171

Mr. Rassner: No, I do not think that is quite right. I object to that.

A. Well, may I say what I, from the evidence, gathered in the case and then you can correct me? Can we do it that way.

Mr. Rassner: I have no objection. I think that is fair.

The Witness: Let me put it that way. Is that all right?

The Court: Yes.

1172

A. These are the facts as I have learned them. If I am wrong I can be corrected.

Mr. Rassner: Oh, absolutely. I think that is an excellent suggestion, Dr. Stimson.

A. I would like to say at this point as a doctor, that for the last twelve years, who has been treating patients with poliomyelitis, my sympathies are very strongly with the patients. I work with them all the time. I feel very strongly that everything should be done to help them get back their strength.

1173

I also want to say that I think one of the tragedies of poliomyelitis is the thought "it might have been different if I had had different treatment." It is a tragedy. A fellow says "Oh, if only somebody had done something different for me I might not be like this."

I am so sorry whenever anybody has that opinion, and I am also sorry when anybody is told, "We cannot do anything more for you here. A year has passed and we cannot do anything more for you."

And on the other hand you string him along. You say "Give him treatment for ten or fifteen years." That is a tragedy.

Now I would like to, before I take up this particular case—I would like to say something about what happens when we get poliomyelitis. It is like burning your finger with a match. You have the exciting cause and the result on your finger. You blow the match out and the exciting cause is gone but you still have the burn on your finger. It either gets well or it leaves a scar or something. Polio is just like that.

We have the exciting cause, which is the virus. We cannot do anything about it but we have the results of the virus which are sometimes negligible, more often negligible but sometimes terrible. Now these results are spasm and weakness. Now if spasm and weakness are allowed to persist, unbalanced, then the body is pulled into abnormal states and we have what is called deformities.

Now weakness is not a deformity. I want the word "deformity" used correctly in this testimony that I am giving, see? Weakness is not a deformity. It is a weakness—weakness in certain cases of poliomyelitis is inevitable.

Deformities are another matter. If a person has a crooked back, why have they got a crooked back? Because muscles on one side were tighter or weaker or stronger than the muscles on the other side, and the tight, strong muscles overpull the weak ones, and you get a crooked back, and a crooked back is a deformity. Or a club foot is a deformity. Those are definite deformities and are quite different from weaknesses.

Now I want that definitely made out, and I will say that while we are practically entirely helpless as regards the extent of a patient's weakness, we are not helpless as regards the patient's deformities, and most deformities should be prevented. You cannot prevent a patient's weaknesses. That is due to death of the anterior horn cells.

Now as I understand the facts in this particular case—

I have not had a chance to talk with the patient—but as I understand the facts and wrote them down, he went to Shanghai on the 31st of October. The ship left Shanghai on October 1st—

Q. November 1st. A. November 1st, I beg your pardon —went to Hong Kong, and was there about the 6th. He was back in Shanghai on the 11th, where it remained to about the 23rd; that it went then to Tsing Tao, from approximately the 25th to the 28th, and that on that trip to Tsing Tao they had an overcrowded ship, but by that time the patient was already sick; that the patient had 1178
some evidence of illness about November 11th—

The Witness: Is that correct?

Mr. Rassner: About that, yes.

A. (Continuing) About November 11th, which is eleven days after he was ashore at Shanghai—is that correct?

Q. That is correct. A. (Continuing) That he did not go to bed until the 21st of November or thereabouts; that he reported sick on the 24th of November, and that some of the symptoms with which he reported sick were pain under or around the ear and a burning sensation all over.

I will say at this time that I never have seen a patient 1179
with polio who complained of pain around the ear or a burning sensation all over.

Mr. Rassner: Perhaps we might correct that impression now. It was pain in the neck, behind the left ear.

The Witness: Oh, behind the left ear but not in and around the ear?

Mr. Rassner: Nothing at all about the ear.

The Witness: I see. What about the burning sensation?

Mr. Rassner: He had the burning sensation

which started behind the neck, that is, behind the left ear, started to go down the neck (indicating) and started to go all the way down his body gradually.

A. (Continuing) I haven't heard the patients use the expression that they feel like burning. That has not been my experience.

I think it was also reported that the patient was nauseous. That is an interesting use of the word, because technically something that is nauseous is something that inspires nausea in somebody else. I don't think he was nauseous.

Mr. Rassner: Well, perhaps we might correct the Doctor as long as he is on this hypothetical proposition.

The Witness: That is just a minor point.

Mr. Rassner: That the plaintiff felt like regurgitating and throwing up, and then he did get something and he threw up and he felt better.

The Witness: I see. He had nausea and he vomited.

Mr. Rassner: That is right.

A. (Continuing) That he was in his berth until the 1st of December when he walked ashore with—

Mr. Rassner: He did not walk ashore.

The Witness: What?

Mr. Rassner: I think your hypothetical question is bad.

The Court: Well, he was helped.

The Witness: Well, he was helped ashore but he went on his own feet. He was not carried.

Mr. Rassner: He was aided off.

The Witness: Yes. He wasn't carried.

Mr. Rassner: That is right.

The Witness: All right.

A. (Continuing) That he went to an Army hospital where the first record that he had poliomyelitis was dated the 7th of December.

Mr. Rassner: No, that is incorrect also.

The Witness: I would like to know the facts on that.

Mr. Rassner: No. That was the date of dis- 1184
charge, during the interval that they diagnosed the case. Whether they diagnosed it the first minute or the first hour or the first day or later, is not known.

The Witness: I see.

Mr. Rassner: The records, unfortunately, are incomplete. They are in evidence.

The Witness: I see. All right. I wanted to know the facts.

A. (Continuing) Now before I comment on this particular case, I would like to say that there has been a good deal of study as to why, when a thousand people are exposed to the 1185
polio virus, some come down with the clinical disease and some don't. It is still largely theory but there are certain facts that are beginning to come up, certain theories that are beginning to come out of the studies that are suggestive. One of them is, of course, dosage. A person who gets more virus is more apt to get the clinical disease. That is obvious with any infection.

A second one is removal of the tonsils. It seems to open a pathway in the pharynx to enable the virus to get through to what is known as the bulb, and we are more apt to have serious cases, bulbar cases, following shortly after a tonsillectomy than not following shortly after a tonsillectomy.

A third factor is exhaustion due to fatigue, and chilling. There is a good deal of clinical evidence that the patient who has come down with the first manifestations of the disease or who is just incubating the disease if he gets thoroughly exhausted, is apt to have a worse case of the disease than if he went to bed promptly.

There is a good deal of clinical evidence as to that, so that we feel that rest in the early stages of the disease is quite important. If this patient had gone to bed on the first day of his illness, who knows whether he would have been as sick as he is now? I think personally that that is more important than whether or not he had hot packs put on him. If he had been—I am down here to testify what I think about this thing, and no matter which side it falls, I told the counsel I was going to testify as I saw fit on this. If this man had been sick and had said he was sick and had been ordered to work when he was sick, it might conceivably have aggravated his polio. If it can be shown conclusively that this man was in bed and ordered to get up and go to work, it might conceivably have aggravated the disease. My sympathies are with him and if that can be proven, that is one thing; but I do not feel that the fact that he had no packs for the first six days of his bed treatment can in any way be considered a cause for his present weakness.

Packs applied to an extremity do not affect the condition of the nerve cells in the spinal cord, and there is your fundamental pathology.

Now this gentleman I understand has been sick two years. That is comparatively early in the stage of treatment. He may not get back any more—he will not get back any more nerve supply to his muscles, but what muscle strength he has can be increased by exercise, even as a person with a normal muscle can go to a gymnasium and exercise it and perhaps double its strength. So a person with a fifth of a muscle can go to a gymnasium and exercise

and double that fifth, perhaps to two-fifths. If it is only a tenth of a muscle and he exercises and doubles it, he has two-tenths, which is better than one-tenth.

So one thing he can do is exercise, exercise, and try to increase the strength of what he has left.

A second thing that can be done for him is, there are orthopedic operations which will make life often, in many cases, much more—well, increase one's horizon is the usual term we use—expand your horizon; and, finally, people can be taught to substitute, to use a good muscle to take the place of one that is bad, and to carry on. This is called 1190
rehabilitation, and there are here in New York City three excellent places where one can get rehabilitation: Dr. Rusk's work at Bellevue is good; the Institute for Crippled and Disabled at 23rd Street and First Avenue is good, and if he is a citizen of New York State, the New York State Reconstruction Hospital at Haverstraw is probably the best. It is excellent, where they teach them to make the most of what you have got in the treatment of poliomyelitis after the first acute stage. The whole motto of the place is "Teach the person to make the most of what you have got."

We all of us are restricted somewhat. I have to wear glasses when I read. I was born too soon and I can't play 1191
singles in tennis any more. I am restricted. Some of our restrictions are more obvious than other people's restrictions, but everybody has some restriction.

The poliomyelitis patient's restrictions are rather more obvious than others, but that is no reason why he should be limited by them. The sky is the limit as to what a polio patient may do if he goes at it.

You had better ask me some more questions. I talk on indefinitely.

Q. Doctor, will you please now direct your attention to the facts that you recited in the record as to the dates that this plaintiff was in bed? A. Yes.

Q. Would you state whether or not in your opinion the fact that he stayed in bed without any medical treatment of any kind in any way affected the end result? A. There again I have got to elucidate a little bit.

There are some forms of poliomyelitis where early treatment is of tremendous importance. These are cases where there is breathing difficulty. A patient must have prompt and efficient care. The cases where early treatment is of most importance is where a life is at stake. It may make a difference whether a patient will live or die, depending on what early treatment he gets.

The so-called bulbar cases are important if there is difficulty in swallowing.

Mr. Rassner: That is objected to. We are not interested in bulbar cases. That is quite a field and I do not think we ought to go into it.

The Witness: I understand there was some bulbar involvement in this patient. He had a little difficulty in swallowing. Is that not right?

Mr. Rassner: I withdraw my objection.

The Court: Go ahead.

Q. Yes, that is correct. A. All right. Life or death may depend on the early treatment of bulbar cases, particularly if the patient cannot swallow at all, because then he has to be fed some other way. But if he can swallow somewhat it is not so important. Now it just happens from the nature of the infection that bulbar manifestations, if the patient does not die, are more apt to go on to complete recovery than involvements of the arms and legs and body.

A facial weakness is not technically a bulbar case but a facial nerve weakness is more apt to go on to complete recovery than an arm or a leg weakness.

Difficulties in swallowing are more apt to go on to complete recovery.

I understand that in this particular patient there was at one time a little facial weakness and a little difficulty in swallowing and that these have gone on to complete recovery without any treatment in the first week or ten days of his disease. So that the point that comes up in question about this particular patient is not his bulbar manifestations but his so-called spinal manifestations which are his weakness of his arms and his legs. I have not seen any evidence that he has any so-called deformities.

1196 The Witness: Is there such, may I ask that?

Mr. Rassner: I have no objection to the doctor examining Mr. McAllister so we can have a real true picture of what he has got.

The Witness: Do you want to take time for that?

The Court: I do not know whether that is necessary.

Mr. Rassner: Otherwise I object to the Doctor—

The Court: It was stated here without contradiction at all that he has lost the use of his—

The Witness: That is weakness.

1197 The Court: Well, everything below the waist—

The Witness: That is weakness.

The Court: —and weakness in the left arm.

Mr. Rassner: I object to the Doctor commenting on his condition unless he looks at him. I have no objection to his looking at him. Either he looks at him or he does not talk about him.

Q. How long will it take you, Doctor, to give Mr. McAllister an examination? A. About two hours to do a proper examination.

Q. Well, I mean to examine him as to whether he has any deformity? A. Oh, that wouldn't take very long.

1198 Q. That is the only issue, as I understand. A. Well, I think that is not necessary.

Mr. Rassner: If I may be permitted to say so, it is very simple. Just look at the man and tell whether there is a weakness or a deformity.

The Witness: No, it is not as simple as that, I beg your pardon.

Mr. Rassner: Well, I am not a doctor and I won't testify.

1199 A. Aside from that, I do not think it is necessary. I will put it this way: the treatment in the first week or ten days is not going to determine whether a man has a deformity or not. Deformities develop weeks and months after the onset of the disease, weeks and months afterwards due to the muscle imbalance. By muscle imbalance I mean a muscle on one side of the spine being strong and on the other side being weak. You have an imbalance on the two sides, and it pulls the back crooked. What happens in the first week or ten days is not going to be of importance in that long result.

Q. On this imbalance, is that where the Sister Kenny method comes in to assist the patient? A. Yes. It is very 1200 helpful in that respect. Since her treatment has been widely used there have been some definite results, one of which is the patients are much more comfortable because the hot compresses relieve pain. A lot of other things relieve pain.

A second result is that there has been much less—not elimination of it but much less deformity, much less.

There is no evidence at the present time, however, that there is less weakness in patients treated by the Kenny treatment than by any other of a number of different methods. There is no scientific evidence at the present time on that.

Q. Then in your opinion, Doctor, will you state whether

or not the fact that Mr. McAllister lay in bed for from seven to nine days without any medical attention, whether that had any effect upon or produced his present condition in which he has lost the complete use of his legs below the waist? A. There is no evidence in science that I know of that a change of treatment in the first week or ten days is going to affect the nerve supply of the muscles, and there is no reasonable assumption that if a patient is given proper treatment after the first ten days that any subsequent deformity that may develop could be traced to the first ten days. 1201

Q. Will you also state, Doctor, whether the symptoms which you have described are those which would invariably point to the existence of polio in the patient, or whether it would be necessary to have a spinal tap to confirm such a diagnosis? A. The spinal tap seems to be, in the evidence that I have read, seems to be something wonderful to behold. It is going to confirm the diagnosis. We have patients come in to us who have evidence of weakness, on whom we do not do a lumbar puncture if we think the diagnosis is clear. 1202

The spinal tap is only one of the various manifestations, I mean of the bits of evidence which it all tied together, will help make the doctor think that the patient has polio. 1203

As I said awhile ago, there is no diagnostic feature, symptom or sign of polio. It can be simulated by a number of other conditions. It is not—there are times when it is not an easy diagnosis at all, and while doctors all over the world have heard of polio, it is amazing how many doctors cannot diagnose it well, because I am teaching them right along. They are coming from all over the country to be taught at where I am.

Q. Now I should like to read to you the question and answer in the testimony of Dr. DiFiore, on page 18, at the bottom of page 18:

"Now assuming that Mr. McAllister had these symptoms"—and they are the symptoms which you have described—"on the 24th of November and was left to lay in his bunk until the 1st of December, can you state with a reasonable degree of medical certainty as to what effect such lying in bed would have upon the end result? A. Well,—

"Q. With a reasonable degree of medical certainty. A. In my opinion—

"Q. Yes. A. The end result is here seen.

1205

"The Court: 'The end result is' what?

"The Witness: Is here seen in this case. In other words, the end result of lying in bed for a period of time with no treatment. That is my opinion."

Q. Do you agree with that, Doctor? A. No, not at all.

Q. And will you please state why you do not agree with it? A. Because the disease is an extremely variable disease and there is no predicting what is going to happen in a particular case and I cannot see how lying in bed for six days is going to affect the health of the nerve cells in

1206 the spinal cord.

Q. And is it necessary to have a reasonably accurate diagnosis before you start to treat the patient for any malady? A. Oh, no, no. I think most doctors before they know what a patient has got, try and relieve him of what is ailing them. Good medicine has three parts to treatment:

One is the cure. One is the relief. And one is the comfort. They are all important.

Now there are some things we cannot cure—cancer, polio, measles. We cannot cure measles. It runs its course. Chickenpox, we cannot cure it, it runs its course. All right, if we see a case of measles we do not lay down our hands and say "we cannot cure you." We try to relieve the

symptoms, the coughing and the sore eyes and the itching, and we try to make them more comfortable. Give him a little aspirin or something.

Similarly with any illness, when we see a patient in bed, "All right, what is ailing you? I don't know what you have got but what are you kicking about?"

He says, "I have a sore throat." We give him something. He coughs. We give him something for his coughing. We give him some aspirin; we give him relief, try to comfort him, and that is good medical treatment in the three phases. We have not a cure for polio but we have symptomatic relief. If he hurts, we do try to relieve the hurt. Hot compresses relieve it. 1208

Hot tubs relieve it. Aspirin relieves it. It is resting and quiet in bed, and nobody mauling you that relieves it.

We have a standing order on our floor for acute polio: "Don't wake the patient for anything. Minimum handling. If the patient is sleeping and the time comes along for his temperature to be taken, the nurse is ordered not to waken him."

Early in the morning when the ordinary patient is awakened to have his face washed, they do not do it on our floor if he is asleep.

Q. Then is it correct to say that the treatment Mr. McAllister got for the period that he was in bed prior to December 1, is the treatment he would have gotten if a doctor had been called, complete rest? 1209

Mr. Rassner: I object to the form of the question. "Complete rest" he got lying in the bunk without a physician and the attendance of a nurse, and the rest that he would get in a hospital is entirely different. I object to the form of the question.

The Witness: Sure it is different.

Mr. Gray: But—

The Witness: Let me answer in that form because I follow what you have in mind.

Mr. Rassner: Yes, Doctor, of course.

The Witness: Surely. No, I don't think he had the same treatment in his bunk that he would have had if he had been in a hospital, that is obvious. The difference is, I do not know—it would depend a good deal upon the alertness of the doctor in whose hands he got in the hospital. Doctors in the Army are a very variable bunch. Some of them were alert and there were others! And he might have had good care. He might even have been given aspirin and toast and castor oil. There is no telling. It is hard to say what he would have had in the hospital, and I don't know what care he got when he was in his bunk. Probably there was "watchful waiting" as they say.

Mr. Rassner: Not even that!

The Witness: Well, he was at least left alone, I gather, which is pretty helpful.

Q. Now there has been some evidence in this case that others observed his arms and legs twitching and from that it has been deduced that he was in a spasm. Is that the type of spasm? A. That is not spasm as its term is generally used in poliomyelitis.

Q. It would not be an indication of poliomyelitis, would it? A. It occurs in a number of conditions. It does occur in polio in some cases, not in most.

Twitching of the hand, you give them a glass of water to hold out at arm's length and it has to be unsteady if the arm is involved. It will not be unsteady if the leg is involved, for instance, and not the arm.

The technical term in medicine is, for the little twitching of the muscle, fibrillation or fasciculation, from the Latin word facies or bundle; but that is not what is meant by spasm in the Kenny jargon, or in most textbooks.

Q. Or as relates to polio, that is, the spasm? A. The

spasm in polio is a different thing from that. It is a chronic muscle shortening.

Q. Now in your opinion, Doctor, will you state if it is possible under that state of facts which you have stated, that Mr. McAllister might have picked up the germ while he was ashore in Shanghai prior to the first of November, 1945?

Mr. Rassner: That is objected to as—

The Court: I will let him testify again, on that state of facts, what in his opinion—

1214

A. My opinion is that if he were ashore on October 31st—

The Court: I don't know that that was the testimony.

The Witness: Well, that is why I am putting in "if".

Mr. Gray: Just before the 1st of November.

The Court: The vessel left on November 1st, therefore that is the last date that he could have been ashore.

The Witness: That is possible, and since his first evidence of ill health was November 11th, he might very well have been exposed to the virus in Shanghai rather than on the ship. The commonest experience for the incubation period has been thirteen or fourteen days—twelve or thirteen or fourteen days. That is the commonest.

1215

Q. And it is possible, in your opinion, that he might have picked up the virus from the carrier who came aboard the ship? A. Well, if the carriers that are described in number were the crowd that came on board the ship, when the ship went over to Tsingtao the 25th or the 28th of November, and this patient had been sick in bed since the 21st, I do not see how it has any bearing because he already was sick.

The Court: That wasn't the testimony they were referring to. It was rather the testimony as to what happened at Shanghai during the period from November 11, 1945, to November 23, 1945, or the time when the vessel was at Shanghai at first.

The Witness: I see.

The Court: Which was from September 26, 1945, to November 1, 1945.

The Witness: Yes.

The Court: On both of those occasions it has been testified that there were longshoremen, consiting of coolies, who came aboard the ship, and also there were what they call peddlers and also that there were truck drivers, and what they call passengers—whether they were or not I don't know.

The Witness: In a case of this sort it seems to me idle to conjecture, to guess where this man caught his infection because the possibilities are innumerable. He was ashore in a reasonable length of time. He was also exposed to the people on the ship. It is part of life. We are exposed to people everywhere, and most cases of polio arise from an unknown source. We do not know where it comes from, and it is just a conjecture where it came from. I think conjecture is of no evidence.

The Court: How does this germ that you have spoken about get into the throat or nose? Is it floating in the air or does it have to require some physical contact somewhere.

The Witness: I am not an authority on that. Dr. Ward, who is to speak later, I think is one of the country's leading authorities on that subject, and I would like to refer that to him, except that we do know that polio has many similarities to measles, chickenpox, the mumps, and German measles. It acts just like them in many ways, and it

is epidemiology, except it is more of a summer disease than it is a winter disease.

My understanding is that the direct contact with a patient or a healthy carrier is far and away the commonest means of infection. Now what constitutes direct contact is hard to express.

In measles it means that there can be an intermediary. A mother going from one child to another can carry the virus somewhere in a dress or her hands or her hair or her face.

We know that the virus of poliomyelitis is found 1220
in the saliva, the secretions of the nose and throat for the first few days of the disease and before the onset of the disease, so that probably it is more apt to be that source of infection than through bowel movement.

The Court: Through the what?

The Witness: The bowel movement, the stool or feces.

Mr. Gray: You may examine, Mr. Rassner.

The Court: What have you got to say about the testimony to the effect that there was erected on the deck of the ship a toilet or a latrine or whatever you want to call it, and that for a period of 1221
time while the ship was at Shanghai that that toilet was being used, and the water was apparently dropped into the sea, or something leading off the base?

The Witness: Dr. Ward can talk more authoritatively on that than I can.

The Court: All right.

The Witness: Would you ask him?

The Court: Yes. We will take a short recess.

(Short recess.)

1222 *Philip M. Stimson—Cross.*

Cross-Examination by Mr. Rassner:

Q. Dr. Stimson, I was wondering if we might go a little further with instruction on this subject. I have here a little pamphlet put out by Marion O. Lerrigo, for the National Foundation for Infantile Paralysis—I assume you have seen it? A. May I see it for a minute? I don't recognize it by that name.

(Mr. Rassner hands to witness.)

1223 A. Polio and People—yes.

Q. It says here—and do you agree with it—that

> "The first major epidemic of polio, as infantile paralysis or poliomyelitis, is called, occurred in 1916, when 27,363 cases were reported. In the past thirty years, 223,306 additional persons came down with the disease."

Do you agree with that? A. Yes.

Q. All right, that is enough. A. May I add a statement to that epidemic of 1916?

Q. Go ahead, Dr. Stimson, but I was thinking of getting
1224 you out of here by one o'clock, but I am not going to stop you. A. Well, this is very short. That epidemic was at a time when people did not recognize in that poliomyelitis without paralysis and practically all those 27,000 cases were paralytic cases; therefore the mortality was far higher than in more recent epidemics when we have had many cases of the acute poliomyelitis without paralysis.

Q. What I mean to bring out by that question is this, that during the last thirty years with so many hundreds of thousands of cases, the disease has become generally known, hasn't it? A. By name, certainly.

Q. And unfortunately by experience, isn't that so? A. Yes.

Q. And the Kenny method of treatment is known throughout the world, is it not? A. I might comment on that. 1225

Q. Yes, I wish you would. A. Miss Kenny being a lay person, can use publicity which doctors cannot use. She is not averse, not unaware of the benefits of publicity.

Q. Yes. A. And much of her publicity has been of a kind that doctors cannot use, and if a medical message had had the publicity that her methods have used, people would not think of her method as a sine qua non. There are other methods probably just as effective but haven't had the publicity. 1226

Q. I did not mean to tread upon the tender feelings of the medical profession. A. I know her quite well. I have entertained her at dinner in my home.

Q. Well, she said some pretty nice things about you, too, Doctor. As a matter of fact you wrote her a very nice letter yourself, didn't you, and she seems to be pretty proud of that; do you remember that? A. I don't remember which one that was. I could show you some ten-page letters she has written me—single-spaced too.

Q. Well, those bouquets have gone between you and Sister Kenny for a long time. However, I did not mean, as I said before, to compare Sister Kenny and her methods 1227 to the medical profession and its scientific knowledge. A. Well, I was picking you up on the widespread knowledge of Sister Kenny in doctors, and the widespread knowledge of medical methods. You cannot compare that.

Q. I did not intend to. All I wanted to show by my question was that the Sister Kenny method is pretty well publicized all over the world. A. No, I am not going to agree with that because most people think of the Sister Kenny method as the application of hot packs. All over the world people think that if they put on hot packs that is Sister Kenny's method. It is a very small part of the Sister Kenny method.

Q. Well, let us put it this way, that a very small part of the Sister Kenny method, particularly that which is known as the hot pack treatment in the early stages, is known to every physician that practices medicine? A. And that is a negligible part of the Kenny method.

Q. Yes, but it is known to every physician, isn't it, throughout the world, generally known? A. No.

The Court: That is objectionable. I think we went over that yesterday with Sister Kenny and she was very frank in her response.

1229 The Witness: Very, very.

Q. But it is pretty well known, it is generally known. A. Pretty generally publicized.

Q. That is what I mean. Now I would like to develop this question of the modes of transmission, and what little I know about that is based on a little book called Stimson on the subject. A. If you want to save some time, Dr. Ward is much more an expert on it than I am, and he wrote the paragraphs in there on the modes of transmission in that new edition, and he will be coming on the stand later. He speaks more authoritatively than I do.

1230 Q. Your modesty again. However, it does stop me. A. I am truthful.

Q. Very well. I will call it modesty, if you don't mind. In any event, you have written on quite a number of contagious diseases, haven't you? A. Yes. That is in that book and some others.

Q. Well, at least the leading dozen contagious diseases, including smallpox? A. Yes.

Q. And other contagious diseases, haven't you? I mean this is not the sole field that you have studied or written about? A. No.

Q. You have written on practically all contagious diseases, isn't that so? A. Well, I have never written on leprosy and a few others I can think of.

Q. Well, I don't think that you can think of many that you haven't written on. You have written on, let us say—
A. Most of the common contagious diseases of childhood.

Q. Most of the contagious diseases, isn't that so? A. Yes, sir.

Q. We will reserve that. You say Dr. Ward is here. A. Yes.

Q. And he has written that article on modes of transmission? A. Yes.

Q. However, we do know this, that the disease is one that attacks mankind and does not attack animal life? A. 1232
Except monkeys.

Q. Well, that is only by artificial means. A. No.

Q. In any event, mankind is afflicted by the disease of polio, isn't that so? A. True.

Q. And it is spread from man to man, isn't that so? A. Yes.

Q. And of course the less contact the less the proportionate danger of infection, isn't that so? Well, that is common sense. A. That is a theory. One person carrying disease is plenty infectious.

Q. Oh, yes, of course as a practical proposition, but as a general common sence proposition I think you have advocated in your book that you should not mingle unnecessarily in crowds, you should watch sanitary conditions and so on, and take as many precautions as possible; haven't you advocated that yourself? A. Oh, yes. 1233

Q. And the reason for your advocating that is of course the less number of people you come in contact with the less the danger of exposure, isn't that so? A. Yes, that is obvious.

Q. All right. Now isn't it a fact that it is a comparatively easy problem for the medical profession to detect poliomyelitis today? A. In certain cases, yes; in certain cases, no.

Q. Now what cases would you say yes, that it is com-

paratively easy? A. Those where there is obvious weakness of a muscle or muscles.

Q. By that you mean if a man is lying in bed and he cannot move his arms and legs very easily? A. Well, he says he cannot lift his arm or his leg from the bed and if he has had a headache and a stiff neck and a stiff back.

Q. And can't take food, swallow food? A. Well, that is in the comparatively unusual case where they cannot take food.

Q. But it is an added— A. It is added.

Q. It is an added danger sign? A. Yes, but nothing specific or diagnostic.

Q. Now that type of picture is comparatively easy for the doctor to recognize? A. Not for the average doctor. A person has to be alert to the possibility of polio, to think of many of the mild cases of polio—

Q. Well, let us put it this way— A. —it is not an easy diagnosis very often.

Q. But I am not talking about very often. I am talking about a case that you say is easy to recognize by the average doctor—give me that case, one that is easy to recognize by the average doctor. What symptoms would he need? A. All right. Sudden onset of an acute illness, with fever and headache and stiffness, some stiffness of the neck and back and other muscles, and complaining of being uncomfortable and showing some weakness in one or more muscles.

Q. How about if you added to that difficulty in swallowing, paralysis of the jaw, that is, inability to move the jaw, and a feeling of apprehension? A. That would be a dead ringer for tetanus or rabies.

Q. What would? A. Inability to move the jaw and a feeling of apprehension.

Q. Well, isn't a feeling of apprehension one particularly found in infantile cases? A. And rabies and tetanus—any acute infection of the nervous system.

Q. Well, that is one. A. It is one of the group.

Q. That is what I mean. So when you add that one to the other signs, that is an added stage or sign, isn't it? A. What do you mean by that, a danger sign?

Q. Well, it is an added sign of polio? A. That you were dealing with an acute infection of the central nervous system, not necessarily polio.

Q. It is certainly indicative of hospitalization, isn't it? A. Of further observation, yes; if it could be done in the home, all right; if not in the home, under care, then in the hospital.

1238

Q. You wouldn't say a ship's bunk is the proper type of place to treat that condition, would you? A. No, I wouldn't think so.

Q. Now you speak quite a bit of the importance of early treatment in your book. I think that is pretty much universally accepted that it is important to institute early treatment? A. Yes.

Q. What do you mean by early treatment—six or seven days? A. Oh, you mean in time?

Q. Yes. A. It depends on the case and it depends on the treatment.

Q. Now let us take it this way— A. As I said before, if it is a bulbar case or a respiratory difficulty case, the early treatment is a matter of hours, and in a respiratory one it might even be minutes.

1239

Q. From your review of the testimony in this case, that is, you stated that you thought Mr. McAllister showed the signs of an early bulbar case, didn't you—bulbar involvement? A. To a slight degree, yes.

Q. Well, we are not concerned with the degree; it is there. A. Well, it involves the degree somewhat.

Q. It does. A. Yes.

Q. Because it wasn't an acute degree, you would not say "Let us not treat him"? A. No, but the early treatment is important as a matter of life and death, and he did not die, obviously.

Q. Therefore early treatment— A. Did not matter in his case, because he is alive.

Q. That is true, but it certainly was incumbent upon the doctor who had examined him to institute early treatment; it was a case that indicated early treatment? A. Oh, yes.

Q. That is what I mean. A. Yes.

Q. What do you mean by early treatment? A. Emphasis on the "early" or on the "treatment"?

Q. Both. A. Well, early treatment means when you have satisfied yourself as to the diagnosis and as to the need for treatment, it may be that day, or you may write
1241 the orders in the book to go into effect the next morning, as far as the illness is concerned.

Q. Yes. In other words, when you see a case is one which shows involvement of the central nervous system, with some disease— A. Yes.

Q. You would institute treatment immediately, wouldn't you? A. Well, I would write down orders in the book for certain things to be done, and some of the things would be done as soon as it is written, and some of them wouldn't be done until the next day, or maybe the next week.

Q. But you would not postpone it indefinitely, would you? A. I postpone some of the treatments indefinitely,
1242 and some not.

Q. All right. Some you would institute immediately, wouldn't you? A. Yes, such as bed care.

Q. By bed care, that does not mean letting him lie in his bunk unattended? A. It means having him as quiet as possible.

Q. As near to the zero position, if I quote your book correctly? A. As near to the zero position? I don't remember that expression.

Q. Well, to the neutral position? A. That is not emphasized as much now as is the comfortable position, which is what we are emphasizing now.

Q. By comfortable position, you do not mean one that

the patient himself wants to assume? A. We do that exactly in children.

Q. How about in adults? A. Well, we urge them to assume a neutral position if it is comfortable for them, but if it isn't comfortable, we try to make them comfortable.

Q. In other words, you supervise the time as to the position that he lays in? A. We attempt to do it.

Q. Right. You attempt to do it, and of course you think it is important for his welfare, do you not; otherwise you would not do it? A. That is right, but—

Q. Well, we are not concerned with the degree? A. Well, it is not the most important thing. 1244

Q. Again we are not concerned with the degree. A. Yes.

Q. You see, I am less demanding than you are in your answers. A. All right.

Q. It is of some importance, isn't that right? A. Yes.

Q. Now of course there is a definite reason for the medical profession wanting to put the patient at ease and relieve him of pain, isn't there? A. Yes.

Q. They do not just do it arbitrarily? A. No.

Q. Suppose you tell us the purposes of relieving pain? A. I thought I had already done that.

Q. Yes, to some extent you have, but I wish you would 1245 repeat it for us and develop it for us. A. All right. Pain is one of the causes of aggravating spasm. It certainly is a cause for discomfort on the part of the patient, and insofar as we can we like to make the patient more comfortable. It is good treatment.

Q. What do you mean by good treatment? How does it affect the patient's end result. A. I said this morning that a good treatment was cure, relief and comfort.

Q. Well, does comfort and relief from pain aid in combatting the effects of the virus? A. I don't think there is any evidence that it has anything to do with the health of the nerve cells in the spinal cord.

1246 Q. I got the impression from reading your book—you correct me if I am wrong—that the innate physical resistance of the human body, of the individual, his state of health, his freedom from other illnesses, such as colds, weaknesses or other cross diseases—that all played an important part in the speed and extent that the virus had? A. Oh, no.

Q. That was the impression I got? A. I don't think that is a correctly obtained impression.

Q. Suppose you correct me. Is food of any importance, proper food to the patient? A. It is conceivable that there 1247 may be cases where it can have some importance, but in general, the vital and essential thing for the patient is the health of the motor nerve fibers. That is the vital and essential thing and the most important thing, other than the effect of the virus on them, is the oxygen supply. Food has very little to do with it.

Q. Very little—that indicates it has some. A. No, I will not even grant has some.

Q. Not even very little? A. On a starved patient, good enough.

Q. That is exactly my point, Doctor, a starved patient. A. I can give you an illustration of that.

1248 Q. I wish you would answer it on the subject you yourself suggested? A. All right.

Q. A starved patient's resistance to the virus. Suppose you tell us about that. A. Oh, that is all theory. There is no fact that I can give on that.

Q. Isn't virus itself theory? A. No, it is pretty well proven about the virus—no theory on that.

Q. What do you mean by— A. But there has been—

Q. Let me stop you. Virus itself indicates an unknown quantity— A. No.

Q. All we know is the effects? A. No, I don't agree with that.

Q. You don't agree with that? A. It is pretty well

known. It is not seen but it is known, and it is seen with ultra microscopes.

Q. Have they finally gotten around to it? A. Yes, in California. I think they have seen it in the—

The Witness: Isn't that right? Well, I can't ask Dr. Ward a question.

Q. All right, I will ask him. In any event, the virus is an unknown organism, isn't that so? A. No. It is known by what it does.

Q. All right, we will put it that way. It is something 1250
that is known by its effects. A. Yes.

Q. All right. Now let us show what starvation of a patient—what effect that has on the action of the virus? A. All right. There is some laboratory evidence on that which—you will have to take my word for it because I haven't the article.

Q. Dr. Stimson, I haven't difficulty with you yet, have I? A. They have taken—a man named Sidney Kramer has taken some rats and fed them a diet that had increased vitamin—the increased anti-neurotic vitamin B1, those of a normal amount, and those that had a deficient amount of vitamin B1, and he found it was harder to infect the rats 1251
with a deficiency of B1 than those who had a normal or increased B1. In other words, the rats that were underfed were harder to infect than those properly fed.

Q. Isn't it—

The Court: You are getting a little far afield. He is bringing in Dr. Steenbock before he gets through with his Wisconsin findings.

Mr. Rassner: He would be a very interesting personality.

The Court: I do not think it is B1—

The Witness: Yes, it is, thiamin chloride.

Q. Well, I thought there was some literature. A. Ask Dr. Ward about that.

Q. But I think we might as well conclude that particular feature of my questioning with this comment: it certainly is good practice to have a patient adequately fed when you are trying to combat the inroads of a virus? A. Of any infection.

Q. Of any infection, isn't that so? A. Yes.

Q. To me that is common sense. A. Oh, yes, sure.

Q. And of course that common sense feature is accepted by the medical profession? A. Oh, surely.

253 Q. Now do you feel that the Sister Kenny method of early treatment, that is, with the hot packs, is of any practical benefit in relieving the end results? A. There are so many ambiguities in that statement. "Practical benefit in relieving the end results"—

Q. Well, I will withdraw the question and I will just take a few articles of literature. You are familiar with this article put out by the American Orthopedic Association which I hold in my hands, are you not (indicating)? A. Is that a reprint?

Q. The National Foundation. A. Is that a reprint from the article that came out in the Journal?

254 Q. That is my impression. A. Yes, I am familiar with that.

Q. I will ask you if you agree with this, page 20:

"Thus, through careful positioning the patient in bed with the knees relaxed in a few degrees of flexion, the feet held at 90 degrees dorsiflexion, the arms abducted slightly from the sides and in slight external rotation at the shoulders and the back supported by a firm bed, and with the additional factors of heat and early movement of extremities most contractures and deformities can be prevented." Do you agree with that? A. Yes, I think I do as to contractures and deformities—

Q. Just answer me whether you do or do not agree. A. Well, you are talking about contractures and deformities.

Q. Now reading from page 21:

"During the early paralytic stage it is imperative that there be adequate food intake and adequate fluid elimination. The care of the bowels as well as the bladder must not be ignored. Enema may be necessary if there is marked involvement of the abdominal muscles. The patient who is being treated by means of hot packs or any other type of heat will perspire profusely. This requires restoration of fluid and of sodium chloride and Vitamin C." Do you agree with that? A. Yes.

Q. And of course the fear and nervousness of the 1256
patient should be alleviated or allayed as much as possible? A. Yes, I agree it is important but I do not agree that there is any evidence that it will affect the ultimate strength or weakness.

Q. Then you do not agree with that part of this article that says it will affect the ultimate— A. No, I do not agree. I do not think there is any evidence about that.

Q. All right, you are entitled to your opinion. A. I will put it this way. I would like to change that. I do not think there is any evidence that will affect the ultimate condition of the nerve supply of the muscles.

Q. Let me ask you if you agree with this, reading from 1257
page 18:

"With the onset of actual paralysis the program of bed rest, sedation and protection by bed positioning is continued. Muscle examination should be made but limited to the most superficial degree in order to avoid
A footboard is of the greatest value. If correctly used it will maintain dorsiflexion of the foot and prevent shortening of the gastro"— A. Gastrocnemius—that is the principal calf muscle.

Q. Those are the muscles below the knee in the back? A. Yes; the principal calf muscle.

Q. Do you agree with that? A. Yes, I think so, for the sake of argument.

Q. Do you agree with this, reading from page 17, referring to the early stages:

"During this stage which may last three to five days after the onset of the disease, there may be manifestations of involvement of the sympathetic nervous system as well as of anterior horn cells. Patients with these symptoms are restless and apprehensive. Sedation by means of barbiturates and in the rare cases in which there is an appreciable amount of pain, morphine in doses suitable to the age of the patient should be given. Heat may be soothing, and unless the patient's own temperature exceeds 101 degrees, moist but not woolen packs should be applied over the spine and to each extremity in which there is beginning weakness, muscle soreness or change in muscle tone."

And then it describes how often these packs are supposed to be used. Do you agree with that? A. No.

Q. Do you—A. Wait a minute, I will tell you why.

Q. Well, you do not agree— A. Sedation—

Q. Dr. Stimson, do you want to get out of here? I will let you give the reasons right along, but I am trying to be kind to you. A. All right.

Q. You have given an answer and you said no. A. That is the critical thought, that sedation is necessary in acute cases of poliomyelitis.

Q. In other words, medical authorities differ. A. Well, obviously.

Q. And you do not agree with this one at least—this part of it. A. Well at least with good reason.

Q. Do you agree with this, page 19:

> "With the first onset of infantile paralysis the attending physician must be constantly on the lookout for signs of bulbar involvement."

A. Yes.

Q. Now is it fair to state that in the first instance where a patient shows the signs, symptoms, and makes the com-

plaints that Mr. McAllister made when he was confined to his bed, that proper treatment demanded that he be put under the care of a physician? Isn't that common sense? A. That is a strong statement.

Q. Of course it is, and I deliberately have made it so. Do you care to have the question read back to you? A. No. I would like to state that anybody in a sick condition obviously should have medical care where the the circumstance is such that medical care can be provided.

Q. We will come to that in a moment, but in any event that is what he should have? A. Oh, certainly. 1262

Q. You have answered my question. Do you see how simple it is? A. Yes.

Q. We will let the jury decide whether the circumstances were such that he should have had. A. Surely.

Q. Now I would like to read from your book, at page 412, the new edition which you were good enough to lend me:

"Greater emphasis is now placed on the early combating of muscle shortening with moist heat, usually with so-called Kenny packs." Of course you are referring to the Sister Kenny treatment.

"The importance of painstaking muscle reeducation has been stressed." Do you agree with that? A. Yes. 1263

Q. "As a result of these moves, the patients are much more comfortable from the start, and they are spared having to recover from the effects of immobilization itself." Now would you mind explaining that to us? A. Immobilization means the application of a cast or a splint, which used to be fairly universal before Sister Kenny came over here. One of the things we are grateful to Sister Kenny for is calling attention to the harm that can be done by rigid immobilization with splints or casts. Immobilization does not mean letting a patient lie in bed.

Q. Well, that is the point I make. It isn't advisable to let the patient lie in his bunk unattended for a period

of days? A. Well, we put patients in beds and let them alone in the acute stage.

Q. Unattended? But you come in and look at them? A. Yes, sure.

Q. You watch them. You change their position to see that a limb isn't twisted to the side. You see that he gets adequate food. If he does not take it voluntarily you aid him. A. I think if you will read somewhere else in the book you will find that injudicious handling is apt to be detrimental and the patient should be handled as little as possible.

Q. Did you assume that when I asked you about having a doctor watch the patient, correct his position, put his limbs in the best position, that the doctor thinks advisable, and give him adequate food, that I had reference to injudicious handling? A. You would be surprised how many doctors do injudicious handling of polio patients.

Q. Well, perhaps so, but in any event the patient is entitled to the benefit of having the doctor there? A. Oh, yes.

Q. And the best doctor he can get. A. All this jockeying—I will grant all this. I know what you are aiming at. Go ahead.

Q. Precisely. Now, let us see if you do know what I am aiming at. You tell us. A. Why, you are trying to imply that because this patient was in his berth for six days that it militated against his present condition.

Q. Isn't that a rather fair assumption to make? A. And I have already testified that I do not think that those six days had anything to do with his present nerve supply of his muscles.

Q. You are limiting it of course to one particular item— A. The essential one.

Q. To his present blood supply? A. No, the present nerve supply.

Q. Nerve supply, rather. A. Of his muscles.

Q. Of his muscles; isn't that so? A. Yes.

Q. But let us not limit it to one. Let us not be scientifically accurate about one feature and forget the entire picture. I am not a doctor and I do not profess to know medicine but I am trying to apply common sense and what little the medical profession has been able to have penetrated through that thick skull of mine; but if a man is lying in his bunk— A. What do you mean by lying in his bunk? I think that is ambiguous.

Q. Well, let us put it this way— A. Verbal bunk?

Q. Perhaps so, too—depending upon the point of view. In any event, he is lying in his bed aboard a ship. It is 1268
called a bunk. A. Yes.

Q. He is lying in his bed. He was taken to his bed and on several occasions before the 24th, and about two or three days before the 24th of November, 194 , he is confined to his bed aboard the ship; and he is given no solid food for approximately ten days, and all we know is that occasionally he would get some liquids. He himself did not have the physical strength nor the inclination to take the food. His jaw was paralyzed and he couldn't chew. Now, he is lying in his bed— A. Is that in evidence that he couldn't chew at all for ten days?

Q. That is right. A. For ten days?

Q. That is right. 1269

The Court: I do not recall that.

Mr. Rassner: He said he could not chew.

A. At all? There are relative degrees of being unable to chew.

Q. In any event, let us take it this way—whether he could chew or not—my impression was that he couldn't chew.

The Court: That he had liquid food.

Mr. Rassner: That he had liquid food.

Mr. Gray: He said he had difficulty in swallowing, that was all.

A. There is a lot of difference between difficulty in swallowing and being unable to chew.

Mr. Gray: Mr. Rassner, if you will look in the medical history for the Navy you will probably get the facts.

Mr. Rassner: I will withdraw that question. I will give it as near as I recall. Of course if I am guilty of faulty memory I have weakened a point for the plaintiff but it is the jury that will have to decide whether my memory is faulty or not. I would like to put this question:

Q. Assuming that Mr. McAllister on several occasions before the 24th of November, 1945, could not stand his watches, and when he did stand his watches he couldn't do all of his work and it had to be done by other men in his department; that after he would get through with his work, instead of mingling with his fellow shipmates he would take to his bed and remain there; that he would remain in his bed at all times other than when duty required him to be out of bed and on service; that about two or three days before the 24th of November, 1945, the 20th or 21st of November, 1945, he found that he was unable to leave his bed; he found that he had difficulty in swallowing any food, liquid or solid.

He found that he had difficulty in using his jaw and could not take any solid food; that occasionally he was given liquid foods; that he remained in his bunk and the condition was officially reported to the ship on the 24th of November, 1945; that several of the shipmates, including the chief officer, visited him in his bunk and found that Mr. McAllister was complaining of a stiff neck, that he was complaining of pain in the back of his neck behind his left ear; that he was apprehensive and irritable; that he had difficulty in moving any of his limbs.

Would such a set of circumstances indicate to you that a master of a ship or an officer of a ship, having some knowledge of first aid treatment as a requirement before he could get his license, that it would be good practice for him to let the man lie in his bunk after that time, after the 24th of November, 1945, without medical observation or examination or treatment?

I would like an answer to that. A. Well, that is some assumption.

Q. It is hard to believe, isn't it, Doctor? A. I do not know whether to answer—

1274

Q. But I mean it is hard to believe; that is what you mean by your comment? A. Yes—no. I mean some assuming. There are so many detail

Q. Let us assume it. A. It is hard to follow all the way through.

Q. Do you want it reread, Doctor? A. No, it is too long. The answer is, I can't say yes or no because I do not know which is the correct answer to all that; but the answer is that a ship's officer would have done well to give such a patient medical attention if the medical attention were available.

Q. Well, yes, I will accept that as an answer, but of course if the medical attention was available or not is another question. That is the second question. A. Yes. 1275

Q. The question is, it indicated the need for medical attention? A. Oh, yes.

Q. No question about it. A. Oh, yes.

Q. That is what I mean, no question about it. A. No.

Q. And of course after the 24th of November each day that he was left to lie in his bed in that condition was adding injury to insult, wasn't it? A. That is not a good way of putting it.

Q. No, I have reversed the usual phrase: insult to injury. A. Well, it might have increased the need for a doctor, each day increased the need for a doctor.

Q. All right. A. Provided that the manifestations were increasing.

Q. Or the same? A. Or the same.

Q. Yes. A. But they might have diminished.

Q. I think you have been pretty fair with us, Doctor. Now I will try to restrict or make this cross-examination short. Isn't it plain ordinary common sense that without any treatment at all, left lying in his bed in that condition, that the virus was given a free range and its effects became more progressive? A. No, that is not a fair assumption.

277 Q. That is not a fair assumption? A. No. We cannot control the course of the virus.

Q. We did not say anything about control the course of the virus. A. Yes.

Q. I am talking about resistance, or the effects of the resistance. I am talking about his resistance to the virus. What is the purpose of adequate rest, freedom from pain, relief from pain, proper nursing care, adequate food, glucose intravenous injection— A. I gather all that. Let me interrupt—

Q. I mean, is that all just a whim of the medical profession? A. No, As far as viruses are concerned, all 278 those factors are of less significance than in some other conditions.

Q. Very well. They are of less significance. A. Less significance.

Q. But of some significance? A. Possibly of some significance.

Mr. Rassner: Thank you, Doctor. That is all.

Re-direct Examination by Mr. Gray:

Q. Doctor, does it become more easy to diagnose a case of polio if there is an epidemic in existence in the neighborhood? A. Very much so.

Q. And is there any specific treatment for a polio case?

Mr. Rassner: I think this is improper redirect. I mean if he wants to keep Dr. Stimson here all morning, I have a couple of thousand questions.

A. That has been covered. I have already said there was no—

Mr. Rassner: That is my objection.

A. —there was no specific cure for polio. 1280

Mr. Rassner: It has been covered and it is repetitious.

A. No specific cure for poliomyelitis.

Mr. Gray: That is all, Doctor. Thank you.
Mr. Rassner: Thank you, Dr. Stimson.

Mr. Gray: Dr. Ward, will you please take the stand. 1281

ROBERT WARD, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Gray:

Q. Dr. Ward, are you a duly licensed physician—

Mr. Rassner: Oh, I will concede Dr. Ward is one of our leading authorities, if that will suffice.
Mr. Gray: On epidemiology of polio?
Mr. Rassner: Oh, of course.

1282 *Robert Ward—Direct.*

Q. Doctor, you have heard the testimony of Dr. Stimson, and I do not think it is necessary to go through a lot of preliminaries. It has been testified in this case that the plaintiff who has, without doubt, poliomyelitis, and whose lower limbs are paralyzed, was on a vessel in Shanghai between the 26th of September, 1945, and the 1st of November, 1945—

Mr. Rassner: Will you include the left arm in the question?

1283 Q. —and whose left arm has also had some involvement, and whose face and jaws have had some involvement, but which have cleared up; that this patient was an officer on a vessel which lay in the harbor of Shanghai, China, between the 26th of September, 1945, and the 1st of November, 1945; that he first felt ill on the 11th of November, 1945, and that his illness was such that on the 24th of November, 1945, he reported it officially to the Pharmacist's mate on the ship and went to bed, in his bunk.

That after the arrival of the ship at Tsingtao—on the 24th the vessel was at sea, and after the vessel arrived at Tsingtao, arrangements were made on the 30th of November for him to be taken ashore to the Sixth Marine Corps Hospital at Tsingtao; that he was taken ashore at that time, and the first medical report which we have of his malady, his diagnosis, is dated the 7th of December, 1945, in which it was diagnosed as poliomyelitis.

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In your opinion would it have been possible for this plaintiff to have contracted the disease during the month of September or October, 1945, during which period he went ashore on numerous occasions?

Mr. Rassner: Objected to. The form is clearly bad.

The Court: I will let him answer.

A. Yes, I think it is possible that he acquired his infection during that time.

Q. And is it possible, Doctor, to ascertain—

The Court: What is the period that you are talking about?

Mr. Gray: From September 26, 1945, to the 1st of November, 1945.

Mr. Rassner: Now I will concede that almost anything is possible.

The Court: You what?

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Mr. Rassner: I will concede that almost anything is possible.

The Court: All right.

Mr. Rassner: I mean, we are not talking about possibilities, your Honor. I do not think that a court of law is a place for possibilities in place of evidence.

Mr. Gray: I do not think this is a place for argument yet.

The Court: No, I don't think so either.

Mr. Rassner: I object to the form of the question, particularly in so far as—

1287

The Court: Objection overruled. I will permit him to answer.

Mr. Gray: Will the stenographer please read back the question?

(Record read.)

Q. Is it possible, Doctor, to ascertain the exact method by which a victim becomes infected with polio? A. No, it is not possible. We do not know how poliomyelitis is acquired.

Q. Is it still in the realm of theory entirely as to the—

A. Well, of course, there are several theories or hypotheses of how the infection is gotten, but we don't know which is

correct. There is a great deal of evidence for and against these various theories.

Q. How many polio cases have you had under your observation, in your experience? A. Oh, I don't know offhand.

Q. Would it run into the thousands? A. Oh, I don't think so; possibly one hundred or so.

Q. What has been your experience in studying and in investigating the epidemiology of polio? A. Well, that is a pretty broad question. I will try and limit the answer
89 to telling you that we have been interested in trying to find out how virus gets into the human body, where it is distributed in the human body, how it leaves, where it is found in nature, and what are some of the possible modes of spread.

Q. And how much time do you need—

Mr. Rassner: I have no objection if the doctor is given a free hand to go ahead and tell us.

The Witness: Do you want me to give my 30-minute lecture?

Mr. Rassner: I think we would be interested in
90 that, Doctor. I have no objection.

The Court: Where have you done this work, Doctor? Of course, they concede your qualifications, but that does not give the jury or the Court a complete picture of where you gained your experience.

The Witness: Yes.

The Court: Perhaps in a few words you can do so.

The Witness: Well, I have gained my experience in the laboratories of Dr. Albert Sabin in Cincinnati, and in the laboratory of Dr. John Paul in New Haven, starting in about 1940.

Mr. Rassner: Is that John F. Pohl, if I may interrupt?

1291

The Witness: John R. Paul.

And then in my own laboratory, since 1945, at New York University School of Medicine, a total period of study of poliomyelitis of about eight years.

Is that enough, sir?

The Court: Yes. Where were you graduated?

The Witness: I was graduated from the Yale Medical School in 1933, and then interned at the New Haven Hospital for a year, and then went to Johns Hopkins and did more hospital work there; and then I went to Philadelphia and I have been in 1292 so-called academic medicine. I have never been in private practice. I have been interested in teaching and doing research, and my main interest, so far as research goes, lies in the field of poliomyelitis.

Q. And what are your conclusions, your general conclusions, as to the possibility of tracing the infection of poliomyelitis from carriers and from other sources of possible infection? A. Well, all I can say, perhaps, is to reiterate that we do not know how it is spread, but I will try and give you some of the facts that we do know now.

One is that there is good reason to believe that the virus 1293 gets in by way of the alimentary tract.

Q. In food? A. By the mouth, in other words, and it then penetrates the tissues of the mouth or the throat, or of the lower alimentary tract, the intestines, and proceeds thence to the spinal cord or the brain.

Now I won't go into the reasons for that statement, but the evidence is pretty good, and it is a pretty generally accepted one now amongst the various students of this disease.

Now how is the virus eliminated? Chiefly it appears to be eliminated by way of the intestinal tract. It comes out in the bowel movements and it may persist in the bowel movements for as long as 12 weeks. The record is 123

days actually, that virus was recovered from the stool after the start of infection.

It also may be eliminated in material from the mouth, which probably is caught, spread the way a respiratory disease, such as measles, influenza, the common cold and pneumonia is spread.

We do not feel that there is very good ground for believing that it is a droplet infection.

The Court: What kind of infection?

295 The Witness: A droplet infection, the way of a common cold or diphtheria or pneumonia.

A. (Continuing) Now where is it found outside the human body? It is found in sewage. It may be in sewage during an epidemic, but it has not been found in sewage between epidemic periods. Its presence in sewage does not mean that the virus, that the infection is acquired by way of water. There is no good evidence that the disease is water-borne. The virus has been found in flies trapped in nature at epidemic areas. We don't know what part is played by the fly in spreading the disease, however, but it seems like perhaps a dangerous place for virus to be.

296 Virus has also been recovered from food contaminated by flies at an epidemic. Such food was tested by feeding to chimpanzees in the laboratory and the chimpanzees showed poliomyelitis infection. So that we know that the fly had a capacity to infect or contaminate material which may be eaten by man, but we do not, as I said, really know what the role of the fly is in the epidemics.

Q. Have any other insects or bugs been found to be contaminated? A. No. They have not. I would like to wind up what I said by adding on the fact that while contact, that is, human association, is accepted by almost everybody as a possible means of spread of the virus and it does seem to be that is probably a very important way,

however, it is not generally accepted that human association or contact infection is the sole means of transmission. There may be others, and the fact is the environment may be very important; the fact that this disease is a summer epidemic disease is not to be explained on the basis of contact infection, although the disease may occur all the year round in sporadic or occasional form. The big outbreaks, the seasonal concentrations occur during warm weather.

I don't know whether that helps you at all.

Q. Well, that gives us the background. 1298

Now have you had any particular experience yourself in the treatment of polio cases? A. No practical cases. I am much more interested in the other phase of the subject.

Q. That is, the epidemiology? A. Yes, the modes of spread of the disease. I might say that the reason for that is that it appears to me to be quite hopeless to treat the disease once it has made its appearance, and a much more fruitful avenue of attack appears to lie in the prevention rather than in the doing of something for the patient after he is infected.

Mr. Gray: You may inquire, Mr. Rassner. 1299

Cross Examination by Mr. Rassner:

Q. In other words, the role played by flies in the transmission of poliomyelitis has not been determined as yet, has it? A. That is right.

Q. I mean you cannot testify that a fly has anything to do with it, can you? A. No, nor can I say that it hasn't.

Q. That is right. I mean it is negative; it is not yes and it is not no? A. It is equivocal. It is not negative.

Q. All right, it is equivocal. It may or may not? A. That is right.

Q. So as a point of proof it is non-existent, but we do

know that it is passed on from human to human; that is definite? A. That is one of the theories.

Q. That is not equivocal; that is definite, isn't that so? A. That also lies in the realm of theory; it is supposition.

Q. Borne out by experiment, proven by experiment, isn't that so? A. By "experiment" do you mean that human beings have experimentally been infected?

Q. Well, suppose you and I don't equivocate. The question of the fly being a carrier is something that is not accepted. The fact that it is passed from human to
301 human is accepted by the medical profession, isn't that so? A. Well, things that are accepted by the medical profession are not necessarily true.

Q. That is right, but it is accepted by the medical profession; that is the best we have today to deal with, until something better comes along, isn't that so?

The Court: What are you talking about now, about the fly as a transmitter?

Mr. Rassner: No; the human as a transmitter.

Q. Suppose I withdraw that question and ask you if you wrote this article, reading from Dr. Stimson's book, page
302 369: "Modes of Transmission. — It seems altogether likely that poliomyelitis is spread in a number of different ways. Direct contact with patient or carrier offers one way, although the precise method or degree of contact necessary, whether by the respiratory or intestinal-oral circuit, has not been clearly defined. The fact that epidemics almost always occur in warm weather has suggested that contact infection may not explain the whole story. When this aforementioned fact is coupled with the evidence for the mouth as a portal of entry, the finding of abundant virus in stools, sewage, flies, fly-contaminated food, a case can be made for the study of poliomyelitis in the light of excremental infections. It should be stressed that at present

there is no evidence of poliomyelitis being a water-borne or, except for a few outbreaks, a milk-borne disease. The role played by flies in the transmission of poliomyelitis has not been determined. Although the disease occurs all year round, the concentration of cases during the warm season may be the result of increased dissemination of virus brought about by certain environmental factors not yet understood."

Is that right? A. That is right.

Q. Now is it generally conceded by the medical profession that the disease of poliomyelitis spreads from person to person, either directly or through a carrier? 1304 A. Well, in the absence of definitive knowledge I would say that most people probably believe that, yes.

Q. I mean that is the theory; and I use the word "theory" advisedly. That is the theory or opinion generally accepted by the medical profession, isn't that so? A. I said that, yes.

Q. And accordingly, the less contact there is between one human being and others, the less proportionate danger of contracting the disease; isn't that so? A. If you accept that theory it would follow.

Q. Well, that is the major premise? A. Yes.

Q. My premise follows, doesn't it? A. Yes. 1305

Q. The same applies to sanitary measures, the more sanitary, modern methods are employed, the less danger of the spread of the disease, isn't that so? A. Well, there is very little evidence that sanitation, as we know it, has much to do with the spread of disease.

Q. Well, I particularly have reference to sewage. A. Well, the presence of virus in sewage may be there merely as a result of the human disease, and have nothing to do with the cause.

And it may be the cause? A. No evidence as yet.

Q. In any event, the medical profession has uniformly accepted sewage, and the virus in sewage, as one of the

likely means of transmission of the disease, isn't that so? A. No, it hasn't.

Q. Isn't that considered one of the means of transmission? A. Well, it is perhaps involved. Sewage is involved in one of the theories, but you cannot say that it is generally accepted by the medical profession because it really isn't.

Q. What is meant by "A case can be made for the study of poliomyelitis in the light of excremental infections"? A. Well, just what it says.

1307 Q. Would you mind explaining that? A. You know what "a case" is.

Q. Well, suppose you explain it. Assume I don't know. Will you explain it to us, please. A. Well, a reasonable theory can be built up that poliomyelitis can be spread in ways similar to typhoid fever and bacillary dysentery, which are excremental infections.

Q. Tell me, have you ever treated a polio case? A. Yes, sir.

Q. Have you treated frequent cases of polio? A. Oh, a few.

Q. Do you feel qualified to answer some questions about the treatment of polio? A. I will do my best.

1308 Q. You have read some literature on the subject? A. Some.

Q. If I go out of your field, why, you just stop me.

Mr. Gray: Will you please to talk up.

(Record read.)

Q. Are you acquainted with the article "Reasonable Treatment of Acute Poliomyelitis," by Jessie Wright? A. No, sir.

Q. Do you know who Jessie Wright is? A. I do not. I would suspect that she might be a nurse.

Q. "M. D." A. Then I do not know.

Q. Are you acquainted with Dr. Phillip M. Stimson, the last doctor who was on the stand? A. Yes, sir.

Q. Do you consider him an authority on the subject? A. Oh, yes.

Q. Do you agree with this statement by him in his article—I will read it to you and ask you if you agree with it:

> "Many of the diagnoses are easily made by any doctor. Although no symptom, sign or test proves the diagnosis there is usually enough circumstantial evidence in headache, fever, vomiting, stiffness in 1310
> neck, back, hamstrings and other muscles, and also an apparent muscular inability to lead a physician at least to suspect the disease."

Do you agree with that that it is easily made, that the diagnosis is easily made by any doctor? A. "Suspected," I believe he said.

Q. "Many of the diagnoses are easily made by any doctor." Do you agree with the article? A. Well, I agree substantially with what you read.

Q. Is there any part of that article that I just read that you do not agree with, when you say "substantially"? A. Well, I think you could perhaps just as well say that many 1311
of the diagnoses—

Q. Will you excuse me. A. —are not easily made by any doctor.

Q. May I have a yes or no answer to that, please?

The Court: He has answered "No."

Q. Do you or do you not agree with that?

The Court: You referred to the article. I suppose you mean the paragraph. You have been looking at the whole article which covers quite a good many pages. I don't think you mean the whole thing.

Mr. Rassner: No, I am sorry. My question was badly put.

Q. Do you agree with that part of the article which I have just read? A. Well, I agree with all but perhaps the first sentence.

Q. That "many of the diagnoses are easily made by any doctor." You do not agree with that? A. Well, I think that it is very hard in many cases to make a correct diagnosis.

1313 Q. Then you do not agree with that part of the article which Dr. Simpson, Phillip M. Stimson, has said, "many of the diagnoses are easily made by any doctor"? That is a part you do not agree with? A. No, I do not agree with that, sir.

Q. Very well. Do you agree with this part of the article, page 3:

> "In the average spinal case, with involvement of a leg or an arm, the coordination of care becomes a matter of routine, a schedule of rest, relaxation, of proper nursing care and of measures to combat increased muscle tension can be quickly and ade-
> 1314 quately instituted by any doctor at all familiar with the infection."

Do you agree with that? A. Yes, that is a fair statement.

Q. All right. "Here the proper coordination—going to page 4—"of efforts may be life-saving or at least may help to minimize the after effects of the disease, to lessen the irreparable destruction found after the tidal wave of the acute infection has passed away." Do you agree with that? A. Could that be re-read, please?

Q. Yes, very easily.

> "Here the proper coordination of efforts may be life-saving or at least may help to minimize the after

1315

effects of the disease, to lessen the irreparable destruction found after the tidal wave of the acute infection has passed away."

Do you agree with that? A. What does "here" refer to, the word that starts the sentence?

Q. Well, that is a continuation of the previous manifestation. I will read the entire paragraph, if you like. A. Well, no. Just tell me—

Q. "In the average spinal case,"—I read that to you. Let me reframe my question:

1316

Do you agree that where immediate steps are taken to administer nursing care, rest, sedation, relief from pain and observation of the patient, that the after effects of the disease are minimized, and that "the irreparable destruction found after the tidal wave of the acute infection has passed away" is also lessened? Do you agree with that? A. Well, let me put it this way: I think I would agree with what Dr. Stimson said when he was on the stand.

Q. Do you agree with what I have read? A. Well, I don't believe that we have any evidence really saying that any treatment given during the early stages of the disease, when it involves the legs and arms and not the bulb of the brain, which is a dangerous place—

1317

Q. May I— A. —has any—may I finish, please? —has any influence on the ultimate paralysis or weakness that there may be.

Q. Or non-functioning joints? Will you go that far? A. Well, I am really not qualified to get into the niceties of that.

Q. Very well. Then I would rather you did not make those comments about the end results not being affected by the institution of immediate care.

However, let me ask you if you agree with this—and if I might just state that if you would just answer whether you agree or not, we won't get into these niceties that you brought us into.

Now I would like to have a Yes or No answer. A. It is sometimes extremely difficult to give it.

Q. That is right, and you are the one who is making it so. All I asked is a simple question, do you or don't you agree.

Mr. Gray: I object to that characterization. The doctor knows what he is talking about.

Mr. Rassner: I will agree that the doctor knows what he is talking about, and I will agree that he is one of the best authorities in his field, and that is all I agree to.

Q. Do you agree with this page 6:

"When poliomyelitis has struck, three great responsibilities in the matter of education belong to the pedetrician. Inasmuch as there is pretty general agreement that the sooner the poliomyelitis patient is put to rest the better his prognosis. It is highly important, particularly in the presence of the disease, that parents be educated to put to bed at once any person who has acute illness, no matter how trivial. An apparent attack of indigestion, a head cold, or mere fever and headache may be an oncoming poliomyelitis. Many illustrations may be quoted of such patients who try to continue normal activities and then develop serious, even fatal, cases of this malady. In the second place, parents need to be taught the nature of the disease, and the aims of physiotherapy so that they can better cooperate in the treatment of muscle tightness and the re-education of muscle function."

Do you agree with that? A. Yes, sir.

Q. All right.

Mr. Rassner: Now, if the Court please, I would like to spend about half an hour on further cross examination with the witness, if you care to adjourn for a recess. 1321

The Court: You can make your own arrangements with the witness.

Mr. Rassner: Well, suppose I pass that over to your Honor for decision as to time.

The Court: Well, seriously we have Dr. Ward to consider here.

What are your plans this afternoon, Doctor?

The Witness: Well, I would like to get back to work. However— 1322

The Court: You are not going back to New Haven?

The Witness: I am just as hungry as you are.

Mr. Rassner: I will do it this way, if it is agreeable with Mr. Gray—

The Court: Are you prepared to come back here this afternoon and to submit to a few minutes' more examination by Mr. Rassner?

The Witness: I will be glad to.

The Court: Then we will take a recess now until a quarter past two. 1323

(Recess to 2.15 p. m.)

AFTERNOON SESSION.

ROBERT WARD, resumed the stand.

Cross Examination Continued by Mr. Rassner:

Q. Now, Doctor, I would like to read something from this publication by the National Foundation for Infantile

Paralysis, Inc., Franklin D. Roosevelt, Founder, publication No. 34, page 6, and ask you if you agree with this:

"Keep close watch during epidemics.

"There is nothing typical or diagnostic of infantile paralysis in these symptoms. Most of them may be found in the early stages of a number of communicable diseases. But when poliomyelitis is known to be present in the community, or when a person is known to have been exposed either to a
1325 victim of the disease or someone who has been in contact with him, these signs and symptoms assume greater significance. They call for the immediate attention of the physician."

Do you agree with that? A. Yes, I agree.

Q. Now, reading from page 7:

"The spinal cord is the seat of sickness.

"Infantile paralysis is not primarily a disease of the muscles but rather of the spinal cord and the central nervous system. The damage is seldom uniform or symmetrical. If the nerve cells in the
1326 spinal cord are made but slightly ill or only a few destroyed, then, with proper treatment, there will be only a minor form of temporary muscle-weakness."

Do you agree with that? A. Yes, I agree with that.

Q. Now, reading from page 9:

"Means of spread from person to person.

"Many theories have been advanced as to the manner in which the virus spreads from person to person. There may be several methods of spread. The virus is eliminated from the body of the patient and the carrier with the discharges from the throat

and especially from the bowel. Personal contact, droplets thrown into the air by coughing, sneezing or talking; food, milk or other substances soiled with human excretions may spread the virus to a new patient. It is not known how active a role insects play in the spread of the disease, but flies trapped in epidemic areas have been shown to carry the virus.

"While all the details of the method of spread have not as yet been determined, any method of allowing infected material to be carried from the 1328
source of disease (that is, the bodily discharges of a sick patient or a healthy carrier) to the nose or throat or intestinal tract of some other person may apparently cause new cases of infantile paralysis."

Do you agree with that? A. Substantially, yes.

Q. "Incubation period.

"The time elapsing between entrance of the virus into the body and the development of the first symptoms is the incubation period. In infantile paralysis this seems to be relatively short. In some outbreaks it has been as short as four or five days; 1329
in other cases the incubation period may be as long as ten days or two weeks."

Do you agree with that? A. No. I would widen the limits of the incubation period. We feel that it may be as long as 30 or 35 days.

Q. Do you agree with this on page 10:

"During an epidemic many carriers and persons with the mild undiagnosable forms of poliomyelitis infection unintentionally and unknowingly spread the virus.

"There is no practical way to detect these carriers. All that can be done is to prevent unnecessary contact with others."

Do you agree with that? A. Yes, sir.

Q. Do you agree with this sentence, foot of page 10:

"Since this disease comes from other infected persons, the less the number of contacts the less the chance of being infected."

Do you agree with that? A. Yes, sir. It might be pointed out, if I may make a statement—

Q. I think you have answered the question.

The Court: I will let point it out.

A. (Continuing) It might be observed that most of these statements refer to contact of individuals during an epidemic.

Q. Do you agree with this, page 12:

"Call your doctor.

"In spite of the fact that there is no specific form of treatment, much can be done and should be done by the physician for the patient with infantile paralysis. On the appearance of the very first suspicious symptoms of the disease a physician should be called. His advice should be followed throughout the course of the disease, during both the acute stage and the periods following. The physician can do much to prevent serious complications of poliomyelitis and reduce the crippling that is a common result."

Do you agree with that? A. (No answer.)

Q. I didn't hear you, Doctor. A. I didn't say anything.

Q. That probably accounts for my not hearing you. A. Well, that is a very ambitious statement.

Q. Well, do you agree with the ambitious statement of the National Foundation for Infantile Paralysis, Inc. publication? A. Under some circumstances I think the doctor can do very little towards prevention of crippling deformity.

Q. Under some circumstances he can do very little? Now what are those some circumstances? A. Well, as Dr. Stimson has said this morning, we really have no specific treatment as far as preventing the effects of the virus and 1334
the working on the nerve cell, the spinal cord. The course seems to go on regardless of what is done.

Q. Then you don't agree with this, that the effects—that the physician can do much to prevent serious complications of poliomyelitis and reduce the crippling that is the common result? A. I think under other circumstances the doctor can do much.

Q. All right. Now, if a man has such innate resistance that without food, without medication, without medical supervision, without nursing care, lying in his bunk, he, in spite of these conditions, recovers from the infection, or, at least, from the effects of the virus which has caused the paralysis of his neck— 1335

Mr. Gray: That is objected to. There was no paralysis of the neck. There was a stiff neck.

The Court: Definitely.

Mr. Rassner: All right.

Q. (Continuing)—has caused him to recover from the stiff neck, and he has recovered from the paralyzing effects of his jaw, you would assume that that man has innate resistance to the virus, and that type of man with the aid of medical supervision and the aid of a doctor would make fair progress, and that the danger of crippling after effects would be eliminated if a doctor were called promptly?

1336 *Robert Ward—Cross.*

Mr. Gray: That is objected to because the question does not include the fact that the patient later on lost the use of both legs.

The Court: I will let him answer.

Q. (Continuing) Isn't that so, Doctor? A. I think that your term "resistance" might be discussed. I think the doctor can do probably very little to increase the patient's resistance to the virus.

Q. Let me put the question to you this way: in a case
1337 such as I have described, would this be applicable:

"The physician can do much to prevent serious complications of poliomyelitis and reduce the crippling that is a common result."

In this type of case would that apply? A. You mean in the type of case that recovers spontaneously?

Q. That I described to you, Mr. McAllister's case. A. I should doubt very much whether a physician could do anything.

Q. All right, that is an answer. You should doubt it.

We will take page 13 now and ask you if you agree
1338 with this:

The use of splints, frames and plaster casts in the routine care of the early case of infantile paralysis has been largely replaced by a method of treatment popularized by Miss Elizabeth Kenny, a nurse from Australia. Miss Kenny has pointed out that the pain and some of the loss of muscle power in the early stages of the diseases are related to spasm and the marked increased irritability of muscles. Without attempting to describe this form of treatment it can be said that it appears to have many advantages over rigid and prolonged im-

mobilization which was widely used previously in the care of the infantile paralysis patients.

"The Kenny method of treatment, to be of the greatest benefit, should be applied from the very first days of the illness. As soon as the diagnosis is made the patient should be treated by hot packs, which are an important part of the care. These can be administered best by those who have had some special instruction. Hospitalization for all early cases of infantile paralysis is strongly recommended."

1340

Do you agree with that? A. Yes.

Q. Now do you agree with this on page 14:

"Improvement may go on and on.

"The whole course of acute infection, rest in bed, physical therapy and surgery may cover many months. Improvement may continue to take place even for years. Experience has taught that maximum improvement occurs when expert care is administered from the very beginning. Not for one moment does the parent or the patient dare relax in this supervision and care."

1341

Do you agree with that? A. Yes.

Q. Of course, it is pretty well agreed that the incubation period is from 7 to 21 days, but 7 to 14 usually, isn't that so? A. I don't think we know what the incubation period is.

Q. Are you familiar with the pamphlet put out by the American Orthopedic Association published by U. S. Children's Bureau, Social Security Administration, Federal Security Agency, known as "Infantile Paralysis—The Disease and Its Treatment"? A. No.

Mr. Gray: What is the date, please?

1342 *Robert Ward—Cross.*

Mr. Rassner: It is one of the latest. It is not dated. It is one of the latest, however. It is printed in 1946.

Q. Do you agree with this, page 4:

"The incubation period varies from 7 to 21 days with 7 to 14 usually."

Do you agree with that? A. No.

Q. Do you agree with this:

1343

"The direction of preventive measures in an epidemic area are naturally under the local public health authorities. However, well children are warned against crowded places,"

and so on, "subject to pollution, over-exertion and tonsilectomies. Paralytic patients should be hospitalized if possible, at least screened, and bedding and excreta sterilized. Generally sanitation of the community should be carefully checked, especially sewage disposal and the milk and water supply."

1344 Do you agree with that? A. Yes.

Q. Reading from page 5, do you agree with this:

"The invasion of the central nervous system occurs as a relatively late manifestation and is now believed to occur by extension along neuronal pathways rather than by vascular, lymphatic, or other humoral methods. Certainly, the work of Fairbrother and Hurst and more recent experiments of Howe and Bodian indicate that the virus is almost entirely neurotropic, infecting the neurons and not the neuroglia, and traveling from one part of the nervous system to another by passage along the axis cylinders."

1345

Do you agree with that? A. I agree with all of that except—

Q. As a matter of fact, Sabin is the man—

The Court: Let him finish the answer, please.

Mr. Rassner: He said he agrees with all of that. That is an answer.

The Court: Except.

Mr. Rassner: Except? I am sorry, I didn't hear that.

1346

A. (Continuing) Except the fact as stated in the beginning of the sentence that the infection in the nervous system may occur late. We feel now that probably when the patient gets sick, at the very start, the nerve cells are already infected; probably all the nerve cells that are going to be infected are infected then.

Q. Didn't you say—and correct me if I am wrong—that you studied under Sabin? A. That is right.

Q. Wasn't that Sabin's conclusion in 1946? A. That the virus travels—

Q. That I just read, every word that I just read. Isn't that what Sabin said? A. I certainly believe that he subscribes to all of that except possibly the first sentence.

1347

Q. Didn't he say the first sentence as well as all the rest of it? Look at it. Isn't that taken right from Sabin's work? A. I can't remember all of Sabin's work verbatim.

Q. All right, I will take your answer. In any event, you don't agree with it? A. I agree, as I said before, with the latter portion of it but not the first sentence.

Q. Well, let me ask you this, so there is no question as to who said it. Page 6:

"Sabin feels"—and Sabin is the man you studied under, is that right? A. That is right.

Q. "Sabin feels that up to and including stage three the process is reversible and the neuron may recover, as the damage is still partial, and that only

at stage four is the destruction complete, and, therefore, irreversible and no recovery possible. This is the pathological basis for the extensive clinical recoveries from early paralysis so commonly seen."

Now, do you agree with Sabin's statement as to that? A. I guess I am forced to.

Q. You mean you would not like to, but you have to, is that your answer? A. No, I do agree with it.

Q. All right. A. But I should point out that that is Sabin's theory again.

1349 Q. That is all I asked you. A. There is good evidence for it. And those changes and reversible changes that he speaks about there can take place spontaneously and probably usually do.

Q. And probably under good treatment do, isn't that what you mean? A. Can take place spontaneously.

Q. And good treatment would aid it to take place immediately? A. I have no idea.

Q. But Sabin says it does, doesn't he? A. Sabin mentions no word about treatment.

Q. Do you agree with this statement, page 8:

1350 "On the second or third day of febrale illness the clinical signs referrable to the central nervous system increase. Sensitivity and spasm are likely to be present in muscles other than those attached to the back. Irritability and apprehensiveness are common, but, on the other hand, if the process is accompanied by a large encephalitic component, drowsiness often approaching stupor may be present. It is not unusual to have a patient who seems to be very drowsy who when aroused becomes alert and apprehensive. Paralysis is likely to occur on the second to fourth day. The paralysis appears first as a weakness of particular muscles which in-

creases in degree and distribution with varying rapidity."

Do you agree with that? A. Yes.

Q. Isn't it a fact that if a patient is treated, the effect of the disease is stopped? A. No.

Q. Very well. Do you agree with this, page 9:

"The patient does not like to be disturbed and is apprehensive of being handled. The spasm and sensitivity vary greatly in extent. The posterior neck, the erectus spini muscles and the hamstrings 1352
are almost universally involved to a considerable degree."

Perhaps before I continue with my question you would be good enough to tell us what the posterior neck is. A. The back of the neck.

Q. And the erectus spini muscles? A. Those are the muscles that go along the vertebral column, the spine.

Q. From the neck on down? A. From the neck on down.

Q. And hamstrings? A. Those are these muscles here, the back of the thigh (indicating). 1353

Q. Thank you, Doctor. A. You are welcome.

Q. "The muscles of respiration may be in marked spasm and it is not unusual to observe the respiratory exchange occurring. The paralysis is most variable both in degree and distribution. In a considerable percentage of mild cases none can be recognized clinically whereas practically all the skeletal muscles can be affected in severe cases. The paralysis is likely to be scattered in distribution, although it tends to be regional. The individual muscles are affected in varying extent from weakness which can barely be deducted to complete paralysis without palpable contraction." Do you agree with that? A. Yes.

Q. Now, on page 10, do you agree with this:

1354 *Robert Ward—Cross.*

"Following the subsidence of the fever and the regression of the various activities in the nervous system, the disease enters the recovery stage. The recovery stage can be divided clinically into two periods. First, the sub-acute state when all danger of further paralysis is over but during which the effects of the general inflammatory reaction and the nervous system are still manifest as shown by nervousness, irritability, tenderness, hyperesthesia, stuffiness and spasm in addition to the essential
1355 muscle weakness or paralysis. This stage may last from a few days to as long as two months with a gradual fade-out of the non-motor byproducts. The second or convalescent stage is reached when purely motor weakness is all that remains. The length of the convalescent stage is still more uncertain and variable. The older estimate of three to five years during which improvement of motor function could be anticipated with recovery of damage but not destroy motor nerve cells has been greatly reduced."

Do you agree with that? A. I am really not qualified to say, Mr. Rassner.

1356

Mr. Rassner: All right.

The Court: I am wondering whether this is getting us very far. I have no doubt that these are very learned comments, but I am wondering whether they are not a little bit beyond us in this case.

Mr. Rassner: Well, of course, I could not answer that question, Judge Coxe. I mean, if you tell me I am going afield on it I will stop.

The Court: I am just wondering.

Mr. Rassner: Frankly, I don't know. I have it before me.

1357

The Court: I don't know whether it is getting us anywhere other than to affect the witness's credibility. You have conceded his credibility.

Mr. Rassner: His qualifications.

The Court: His qualifications.

Mr. Gray: I haven't interrupted because I wanted to get everything that Mr. Rassner thinks ought to be before the jury.

The Court: I am not interrupting.

Mr. Rassner: Well, it may be going a little afield, your Honor, but I would rather have it in rather than risk the danger of not having done an adequate task in my duties for my client.

1358

The Court: You are the doctor—not of medicine.

Mr. Rassner: Definitely not. I had such aspirations once, but they are in the distant past.

By Mr. Rassner:

Q. Reading from page 11, do you agree with this, Doctor:

"Acute poliomyelitis is easy of early clinical detection during the full-blown epidemics and can often be diagnosed in the pre-paralytic stage and in abortive forms at such times. It is only when definite paralysis has occurred, however, that early epidemic or occasional cases can be diagnosed. Diagnosis in doubtful cases can be checked by lumbar puncture showing a slight increase of pressure, and a clear fluid with moderately increased cell count of mononuclear character."

1359

Is that correct?

Mr. Gray: What do you mean by "checked"? Stopped or determined? The "checked" means determined there.

The Witness: I think he means "ascertained."

Q. Ascertained. That is right, Doctor. We agree at least on a word. That is exactly what I mean. A. I would agree with the statement too, and I would emphasize that the word "epidemic" is included in the statement.

Q. Oh, yes. A. When you have epidemics there is no difficulty in making a diagnosis, as a rule.

Q. And when you have no epidemic you send the patient to a hospital and there they have the facilities to determine it very quickly? A. Even though the patient may go to a hospital it may be extremely difficult to make a correct diagnosis in the absence of an epidemic.

Q. Yes, but isn't that just the opposite of what the article says, that in the absence of an epidemic you send the patient to a hospital and they check it clinically; isn't that what it says here? A. They do the best they can.

Q. Yes, and they have the means of doing it, and by doing a lumbar puncture, that is a pretty good way of finding it out; isn't that so? A. It helps.

Q. That is the best that is known to medical science, isn't that so? A. No, it is not the best, but the other tests are more involved, more extensive, and perhaps we better not go into it.

Q. Yes. In any event, let us say one of your patients that is ill, confined to his bed, where there is a suspicion of an involvement of the central nervous system, regardless of what the disease is, wouldn't you consider it good practice to have him checked at a hospital where all modern facilities are available? A. I can't deny that.

Q. Do you agree with this, page 12:

"The prognosis is worse in adolescence in adults than in children under 10 years of age?"

A. It seems to be.

Q. Then how about this on page 13:

"If all of the cells remain vital after the destructive phase of the disease has run its course,

there is the possibility of a return of normal power in the muscle. Spontaneous improvement in the overall picture begins in most cases within a few days, and in practically all cases within a few weeks."

Do you agree with that? A. Yes.

Q. Well, then, naturally, the sooner the patient gets the treatment, the better are his chances for a recovery and freedom from crippling after-effects; isn't that so? Isn't that common sense? A. Well, it would seem to follow, but I don't believe the effect of treatment, as I have said before, has large bearing on recovery. 1364

Q. You mean then it is common sense it should follow, but you have no proof that it does? A. That is right.

Mr. Rassner: Very well.

The Court: Proceed.

Mr. Gray: What was that page, Mr. Rassner?

Mr. Rassner: Page 13.

Q. Page 14:

"The prognosis, therefore, while primarily dependent upon the irreversible or reversible damage 1365
to the neurons may be modified and made less favorable by the absence of proper treatment during the period of recovery."

Isn't that so?

The Court: I ask you whether the jury, composed of very intelligent persons, would properly understand what this means without some analysis or some help from a medical man who knows how to use such words.

Mr. Rassner: I would say yes, your Honor.

The Court: Well, I am not going to ask the jury whether they understand it or not.

Mr. Rassner: I will assume they do. It is because I assume that the jury does understand this that I am reading it. I think it is quite simple, your Honor. I would like to re-read it, if I may.

The Court: I will concede they have a much higher intelligence than I possess.

Mr. Rassner: Well, if I were to answer your Honor's remark I might be accused of flattery.

The Court: All right.

Mr. Rassner: If I may be permitted to read it and ask the Doctor if he agrees with it—perhaps I will withdraw that question.

Q. Doctor, you tell us in lay language what this means, and then tell us if you agree with it or not:

"The prognosis, therefore, while primarily dependent upon the irreversible or reversible damage to the neurons may be modified and made less favorable by the absence of proper treatment during the period of recovery. The factors which favorably or unfavorably influence the recovery of the muscles"—

well, I think I am taking another question.

The Court: It sounds like a plank in one of the political platforms. It faces both ways.

Mr. Rassner: Well, of course, when they say irreversible and reversible it does do it both ways. But when they say "less favorable by the absence of proper treatment," I think that is pretty commonplace language.

Mr. Gray: I object to argument now.

The Court: All right.

Q. All right, Doctor, isn't that pretty commonplace language, that everybody who understands English that has gone to elementary school can follow?

Mr. Gray: That is objected to.

A. I don't think it is.

Q. In any event, does this mean that the extent of the recovery depends in a great measure upon competent, prompt and adequate treatment? A. You have left out another clause in there.

Q. I am sorry, which one? A. The business about the 1370
motor cell of the spinal cord which, after all, governs whether or not a muscle is going to return to power, whether the change in that motor cell has been of such a nature as to prevent that cell from recovering. That I think is really the key to this whole discussion.

Q. Probably so. I think you are right. However, the medical profession has not perfected a means of ascertaining whether or not the progress or the damaging effects of the virus can be checked by prompt, adequate and proper medical and surgical aid and attendance, and I ask you, isn't it fair to assume that it does, as a medical proposition, as an opinion of a doctor? A. Oh, no, let us not assume 1371
things like that.

Q. You would not assume that? A. No.

Q. All right, then that is all I asked you. We have your answer.

The Court: What are these neurons? Are those the brain cells that you speak about?

The Witness: The neurons are the cells which transmit—the neurons in the anterior horn of the spinal cord are the cells which transmit the impulse from the brain to the muscles.

Q. Let us see if this does not cause you to change your opinion—

Mr. Gray: About what?

Mr. Rassner: About the fact that adequate, prompt and proper treatment may be an important factor in checking the damaging effect of the virus.

Q. Page 15:

"On the whole, the prognosis in poliomyelitis is favorable; and one may agree with one author who states that 'with good care 75 to 80 per cent of the cases will show marked improvement or complete
1373 recovery.'"

Do you agree with that? A. Yes; and one might add that without good care the vast majority of cases of poliomyelitis go on to complete recovery.

Q. In other words, whoever wrote this pamphlet for infantile paralysis— A. Is aiming that pamphlet at certain people. Excuse me.

Q. My question was this quotation "with good care." Does that have any significance or doesn't it mean anything? That is what I would like to know. Do you say that good care means nothing?

1374

Mr. Gray: I object to that characterization. He didn't say that. He said you get the same results without care.

The Court: Sustained.

Q. Do you mean to say that good care is of no importance; that you can get the same result without good care? Is that your testimony, Doctor?

The Court: I think you have been all over that a number of times.

Mr. Rassner: Well, he does not seem to be able to give us a quick answer on that. He should have been able to say yes or no like that.

A. Well, let me qualify it—

Q. Now, isn't it a simple question?

Mr. Gray: Just a minute. Let him answer.

Mr. Rassner: I would rather have a yes or no answer, if you don't mind, Mr. Gray.

May I have a yes or no answer?

The Court: He may answer whatever way he 1376
wants to.

Mr. Rassner: Very well.

A. I would say that the final result, as Dr. Stimson said this morning, the degree of paralysis or weakness that the patient finally comes through with is determined by factors that we do not know anything about and factors which we cannot control so far.

Q. Well, then, do you or do you not agree with the statement as it is written here without any qualifications:

"On the whole, the prognosis in poliomyelitis is 1377
favorable; and one may agree with one author who states that 'with good care 75 to 85 per cent of the cases will show marked improvement or complete recovery.'"

A. Yes, I agree with that.

Q. Do you agree with this, page 16:

"Loss of function during or following an attack of acute anterior poliomyelitis may result from prolonged muscle spasm, deformity, or muscle paralysis. It would seem obvious, therefore, that the best results can be obtained if the orthopedic surgeon works

in close harmony with the family physician or pediatrician from the day that the diagnosis of acute poliomyelitis is made."

Do you agree with that? A. That would seem perfectly logical.

Q. That the sooner you start attending the patient, the better the result, isn't that so?

Mr. Gray: That is objected to. He said the diagnosis.

1379 Mr. Rassner: Is my question objectionable, your Honor? I would like to know whether my question is or is not objectionable. I think it is perfectly proper. May I have it read back and I will take your Honor's ruling.

The Court: Read the question.

Q. (Read.) A. Yes.

Q. Now, I have just a few more questions. Do you agree with this:

1380 "With the first onset of paralysis the attending physician must be constantly on the lookout for signs of bulbar involvement"?

Do you agree with that? A. Yes.

Q. Do you agree with this:

"Thus, through careful positioning the patient in bed with the knees relaxed in a few degrees of flexion, the feet held at 90 degrees dorsiflexion, the arms abducted slightly from the sides and in slight external rotation at the shoulder, and the back supported by a firm bed, and with the additional factors of heat and early movement of extremities most contractures and deformities can be prevented"?

Do you agree with that? A. I am not qualified to answer. I think you should have directed these things to Dr. Stimson this morning.

Q. Oh, I made many mistakes in my time, but I want to know whether you can answer this? A. It is really not my field, Mr. Rassner.

Q. Then the answer is that you can't answer the question, is that right? A. Yes.

Mr. Rassner: I think that will be all I am going to ask the Doctor. I hope you don't mind. 1382

Re-direct Examination by Mr. Gray:

Q. Turning back to page 13, Mr. Rassner read this to you, and I would like to have you note the use of the words "spontaneous improvement."

"Spontaneous improvement in the over-all picture begins in most cases within a few days and in pratically all cases within a few weeks."

Now, will you state what spontaneous improvement is? A. Spontaneous means, I believe, by itself without outside 1383 aid. In this case it obviously means without treatment.

Q. And in the case of a bulbar involvement, when you have the improvement, it is always spontaneous, is it not? A. Well, usually it is spontaneous.

Q. I just have one more item; on page 7 of publication No. 34 from which Mr. Rassner read he neglected to add the—

Mr. Rassner: The form of the question is objected to. I make enough mistakes without putting on the record a statement that I neglected to do something. I object to the form of the question.

Mr. Gray: This is a preliminary statement to

acquaint the witness with the situation, Mr. Rassner, which he is about to answer.

Mr. Rassner: The form is objected to. Would you mind reframing the question, Mr. Gray?

Mr. Gray: I will take my orders from the Judge.

Mr. Rassner: I object to the form of the question, your Honor, on the ground that Mr. Gray has charged me with neglect.

The Court: I will overrule the objection.

Mr. Rassner: Then you think that he is right with charging me with neglect?

The Court: I don't know. Did he charge you with neglect?

Mr. Rassner: That is the way it sounded to me.

The Court: We will strike that from the record.

Mr. Rassner: Well, that is all I object to.

Q. Put it this way: Mr. Rassner refrained either by error or deliberately from reading the balance of this statement on page 7, as follows—

Mr. Rassner: I object to the form of the question.

The Court: Let us get along.

Mr. Rassner: Your Honor, I object to that.

The Court: Refrained is the same as did not.

Mr. Rassner: Well, let him say it that way.

The Court: Well, let him. I say it is now changed.

Q. "If the nerve cells in the spinal cord are made but slightly ill or only a few destroyed, then with proper treatment there will be only a minor form of temporary muscle weakness."

That is where Mr. Rassner ended his quotation. I continue:

1387

"But if many of these nerve cells are killed by the infection, the paralysis may be complete and permanent. New nerve cells cannot grow back to take the place of those that have been destroyed. It is the damage to or the destruction of nerve cells in the spinal cord that causes the immediate muscle symptoms."

Do you agree with that, Doctor? A. Yes.

Mr. Gray: That is all.

1388

Mr. Rassner: That is all.

(Witness excused.)

February 6, 1948, P. M.

BEVERLEY CHANEY, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Gray:

1389

Q. Dr. Chaney, are you a duly licensed physician practicing medicine in this state? A. I am.

Q. Where is your office? A. 572 Park Avenue.

Q. What type of medicine do you practice? A. Nervous and mental diseases.

Q. Where did you obtain your medical diploma? A. Medical College of Virginia, 1918.

Q. And since 1918 will you please state to the jury what your experience has been in mental and nervous diseases? A. I have been continuously associated with the Neurological Institute of New York since March, 1919. At the present time I am attending neurologist to the Neurological Institute; attending neurologist at Vanderbilt Clinic, Col-

1390 *Beverley Chaney—Direct.*

umbia Presbyterian Medical Center; consulting neurologist at the Booth Memorial Hospital; consulting neurologist at Flushing Hospital; I am assistant professor of clinical neurology, College of Physicians and Surgeons, Columbia University; I am a diplomate of the American Board of Neurology and Psychiatry. I was licensed by the State of New York in 1920.

Q. Are you familiar with the treatment of cases of poliomyelitis? A. I am.

Q. Have you treated any cases of that type recently?

1391 A. I have.

Q. Will you please assume this, Doctor: The plaintiff in this case is a young man about 30 years of age, who now suffers from a complete paralysis of his lower limbs. On the 1st of December, 1945, he was on board a merchant ship in the harbor of Tsingtao, China, and had been on board the ship since the vessel had started on the voyage from New York in July of 1945. The vessel called at Shanghai on September 26, 1945, and remained in the port until the 1st of November, 1945, when she made a short trip to Hong Kong and returned within a day or two to Shanghai, arriving at Shanghai on November 11, 1945;

1392 that during the stay of the vessel in Shanghai from the 26th of September to the 1st of November, this plaintiff had been ashore almost daily and had circulated throughout the City of Shanghai in various localities; that when the vessel returned to Shanghai on the 11th of November, 1945, he experienced some difficulty with his vision— A. What date was that, may I ask?

Q. On the 11th of November. A few days after that he had attacks of dizziness. A few days later, around the 17th of November, he experienced a pain in the back of his neck, in the vicinity of the left ear, and from that point a feeling of being burned descended and went through most of his body down to his feet, which involved all of his body except

perhaps the right arm; that at about this time he experienced a stiff neck; that he had difficulty in swallowing and in chewing food; that about the 21st of November he went to bed in his room and did not get up until the 1st of December when he was sent ashore; that about the 28th of November he experienced spasm in his legs and left arm; that his arm felt weak; his legs felt weak; that he was nauseated at times; that on the 24th of November, when he first officially notified the medical officer on board the ship that he was ill, his temperature was taken and showed a normal temperature; that on the 1st of December he went 1394
ashore with the assistance of two hospital attendants from the Marine Hospital at Tsingtao; he walked from his bed to the companionway, down the companionway to the pier, to the ambulance and entered the ambulance himself with assistance, and descended from the ambulance with assistance when he arrived at the hospital four or five miles away, and with assistance walked into the hospital and reached a bed where he remained; that the following day, the 2nd of December, a spinal tap was made, and that the first record information which we have of the diagnosis of his malady is dated the 7th of December, 1945, and that his malady was then diagnosed as poliomyelitis. 1395

With those facts in mind are you able to state with a reasonable degree of medical certainty whether or not the fact that he remained in bed or was permitted to remain in bed from the 21st of November to the 1st of December without medical care would have any result upon the final condition of the patient from the disease? A. I have an opinion which I can state with reasonable certainty.

Q. Will you please state what that opinion is. A. My opinion is that the developments which occurred in December were not in any way influenced by the type of treatment or lack of treatment or attention that he may have received previously. In other words, I think that his condition

which developed in December was the natural sequence and consequences of the disease.

Q. And can you express an opinion as to whether or not the apparent lack of medical attention during that period would have a deleterious effect upon his resistance to the disease? A. In my opinion it would not. I think the—

The Court: Doctor, I don't know whether you understood Mr. Gray in this rather long hypothetical question when he said that Mr. McAllister left the
1397 ship on December 1st and went to the Marine Hospital in Tsingtao; in other words, you have been testifying about the period when he was in the hospital?

The Witness: Well, I thought I was attempting to explain was that whatever attention or lack of attention that he may have received from November 11th up until that time—

The Court: You say November 11th, but I understood you to say December. That is my fault.

The Witness: —when he entered the hospital. In other words, I expressed the opinion that what-
1398 ever attention or lack of attention or medical care from November 11th until the disease was diagnosed, had no bearing or relation on the severity or sequalae or the subsequent developments of this disease.

Mr. Gray: You may inquire, Mr. Rassner.

Cross Examination by Mr. Rassner:

Q. Dr. Chaney, you do not mean to tell us that medical supervision and treatment is an idle gesture, do you? A. No, sir.

Q. Would you mind telling us what you mean that if this patient—is it your testimony that good practice would

indicate that a patient having the symptoms and signs and complaints as described by Mr. Gray would or would not require immediate hospitalization? A. I cannot answer the question yes or no. May I answer the question—

Q. Any way you like, Doctor. A. In my 30 years of experience as a neurologist, it has been my experience from a great many cases—and I say a great many hundreds of cases of polio—that during the early stages, both the prodromal and acute stages of the disease, nothing seems to have any determining factor on the subsequent results; that is, I have seen cases of polio develop under the most squalid 1400
circumstances and completely recover.

I have seen cases of polio under the most satisfactory conditions, with the most suitable care other than their being made more comfortable, and I have seen them go on and get worse.

I believe that the end results of polio, that is, the progress of the pathology is determined by the individual's innate immunity toward the virus.

Q. Then we might as well close up all our— A. Except I want to make one exception. Q. Yes. A. That one exception is where polio attacks the respiratory muscles, and I have seen many lives saved by the use of the respirator or 1401
the so-called "iron lung."

Aside from that type where there is respiratory paralysis and ensuing death from failure of respiration, I have seen no curative effects from any type of treatment. There are certain things, quite true: Hot packs, good hygienic conditions, general nursing care, that make the patient more comfortable, but I believe they in no way affect the degree of permanent impairment.

Q. Then, Doctor, you would say that the building, maintaining and paying for hospitals throughout the country to take care of acute cases of poliomyelitis is just a wasted gesture; that you could just as well have a nurse come into

the house, make the patient comfortable, the child, whether he or she—that the patient is going to go on just the same and there is no use of calling a doctor? Doesn't it sound a bit like Christian Science? A. I can't go that far because—

Q. Well, isn't that what you have sworn to in your testimony? A. I did not, I did not.

Q. Didn't you say that it wouldn't make any difference whether this patient received treatment or what treatment he received, it would not have made any difference, therefore this company should not be charged with any damages? 403 Isn't that your testimony? A. No, sir. I answered two questions. I am now attempting to answer your second question as to whether all the hospitals—

Q. Pardon me, but you— A. If I may be permitted to answer the question—

Mr. Gray: Let him finish.

Q. Pardon me. You said "No, sir." That is the answer. Let me put the questions, please, Doctor. When I want explanations I will ask for them.

404 Isn't it your testimony that it is absolutely useless to call in a doctor for a polio patient? A. No, sir, I made no such statement.

Q. Is it important to call in a doctor for a polio patient? A. I made no such statement.

Q. Is it important—I don't think you meant to say that just now. I don't think you heard my question.

(Question read.)

A. I think so.

Q. Why is it important? A. First of all—

Q. To call in a doctor. A. First of all, to establish beyond doubt the actual diagnosis.

Q. What does it make if you cannot do anything about it? A. If it happens not to be actual polio—

Q. I did not ask you that, Doctor. A. Yes, I am answering your question.

Q. I said if it is a polio case. Let us not go into something else. A. All right,

Q. Any use of calling in a doctor—any point in calling in a doctor? A. I think so.

Q. What for? A. As I stated, to be certain of the diagnosis.

Q. What difference does that make if the end result is 1406
going to be the same, if there is a doctor there or not? A. Because if it is not a polio—

Q. But that is not my question. A. Then I cannot answer your question.

Q. I said if it is a polio case, of what benefit can a doctor be? A. Assuming that the diagnosis is polio, is that correct?

Q. I said if it is a polio case.

The Court: Yes, assuming that it is polio.

A. Assuming that it is a polio case, I think the doctor's hands are practically tied and helpless in so far as in- 1407
fluencing the end results of the disease. They may make the patient more comfortable.

Q. The minute you know it is a polio case, don't call in a doctor, isn't that so? A. No.

Q. Isn't that what you just said? A. I most assuredly do not.

Q. Call him in for what? A. I think the patient can be made more subjectively comfortable. In other words—

Q. Can't a nurse do that?

The Court: Let him finish. He started two or three times.

Mr. Rassner: All right.

A. There are certain symptoms connected with infantile paralysis that can be subjectively relieved; the pains, the results of muscle—so-called muscle spasm; certain types of discomfort can be relieved by measures.

However, those measures do not influence the outcome of the disease.

Q. In other words, the only— A. In its acute stages. I am talking only about acute polio. Chronic polio or the end results, that is an entirely different problem there. There we really have something.

Q. So the only use then for a doctor would be to relieve the pain or to make the patient comfortable?

Mr. Gray: That is not what the witness said.

Mr. Rassner: That is my question.

A. For the most part, if there is no respiratory paralysis.

Q. Anything else? A. Probably not, unless there is some sphincter disturbance—

Q. Well—

Mr. Gray: Please let the witness finish.

Mr. Rassner: After the "probably not," I ask that the rest of the answer be stricken out.

The Court: No, I will permit it.

A. Could I answer the question this way——

Q. You have answered it so far as I am concerned. Do you know who Dr. Lewin is? A. Dr. who?

Q. Lewin—L-e-w-i-n. I have reference to Dr. Philip Lewin, M. D., F. A. C. S., Associate Professor of Bone and Joint Surgery, Northwestern University Medical School; Professor of Orthopedic Surgery, Cook County Graduate School of Medicine; Attending Orthopedic Surgeon, Cook County and Michael Reese Hospitals; Consulting Orthopedic Surgeon, Municipal Contagious Disease Hospital, Chicago. Did you ever hear of him? A. No, sir.

Q. How long have you been in the practice of medicine? A. I was licensed in the State of Virginia, 1918; in the State of New York, 1920.

Q. You never heard of him? A. No. He is an orthopedist and I am a neurologist. As a matter of fact, there are good neurologists that I never even heard of.

Q. Did you ever hear this comment by any neurologist:

> "The importance of diagnosis prior to the moment at which the virus attacks the nerve cells of the spinal cord cannot be over emphasized. Diagnosis and treatment should be considered in terms 1412
> of minutes and hours, not days?"

Did you ever hear of that? A. No, sir, and I don't agree with that statement.

Q. You would not agree with that, would you? A. No, sir.

Q. Now did you ever head of this:

> "In the presence of the symptoms, signs, and physical observations mentioned, a presumptive diagnosis of early acute poliomyelitis may be made; then a lumbar puncture should be performed to aid in establishing the diagnosis." 1413

Did you ever hear of that and do you agree with that? A. I haven't heard of it, but I think a lumbar puncture should be performed.

Q. Do you agree with that comment? A. Not all.

Q. What part of it don't you agree with?

> Mr. Gray: Suppose you show it to him and let him read it. He can give you the details.

A. I agree with that part where it says that a lumbar puncture should be performed as early as possible to arrive at a diagnosis.

Q. That is all you agree with? A. That is all that I can recall in there. There may be some others.

Q. Did you ever hear of Jessie Wright of Pittsburg, a doctor? A. Jessie Wright?

Q. That is right. A. I know one Doctor Wright in Pittsburg. I don't know whether the first name is Jessie or not.

Q. In any event, do you agree with this statement by Dr. Wright, page 3:

> "After initial medical and nursing supervision of the patient with acute infantile paralysis, pain and tension may be relieved considerably in certain types of poliomyelitis by moist heat in the form of fomentations if the packs are prepared properly and applied as tolerated. Then painless guided motion is possible earlier, circulation and tissue tone improve, avoiding the atrophy of muscles and stiffness of joints seen after prolonged rest and restriction."

Do you agree with that? A. I will agree with that, as I said a moment ago. That is the reason I think the doctor should be called even though there is little they can do in the acute stage. They can make them more comfortable. I do not believe it influences the end results of the disease.

Q. You could not say whether you agree with it or do not agree with it without an explanation, could you? A. No, I could not.

Q. Now— A. I could not further to this extent, because it would not prevent atrophy—

Q. Do you— A. Atrophy is due to the disease of the anterior horn cells in the spinal cord and any hot packs or anything else you will do is not going to prevent that.

Mr. Rassner: I move to strike out the last part.

The Court: No, I will let it stand.

Q. Did you ever hear of Robert L. Bennett, M. D., of Warm Springs, Georgia? A. I think so.

Q. Do you agree with this statement—do you consider him an authority? A. No.

Mr. Gray: Will you please state from what you are reading?

Mr. Rassner: I am reading from "The Role of Physical Medicine in Poliomyelitis" by Robert L. Bennett, M. D., of Warm Springs, Georgia, Professor of Physical Medicine, Emory University Medical School and Director of Physical Medicine, Georgia Warm Springs Foundation. 1418

Do you agree with this—you never heard of him or you did? A. I think so.

Q. Do you consider him an authority? A. No.

Q. You don't consider him an authority? A. No.

Q. Do you agree with this:

"Therefore, it is of utmost importance not only to preserve normal bodily mechanics and alignment by the early restoration of mobility in muscle and joint as mentioned, but also to prevent persistent faulty posture by the most effective methods possible." 1419

Do you agree with that? A. I do not agree with that.

Q. Very well. I think I am almost through.

Q. Did you ever hear of Dr. Stimson? A. Yes.

Q. Do you consider him an authority? A. No individual is an authority in all respects. In other words, I could not make the flat statement as to whether an individual is an authority. If I say he is an authority, by that I do not mean that every statement or every opinion that he may express is authoritative.

Q. Do you consider Dr. Philip Moen Stimson, A. B.,

M. D., Associate Professor of Clinical Pediatrics, Cornell University Medical College; Visiting Physician, Willard Parker Hospital; Director, Poliomyelitis Service, The Knickerbocker Hospital; Medical Director, The Floating Hospital of St. John's Guild; Associate Attending Pediatrician, the New York Hospital; Consulting Pediatrician, The Meadowbrook, Bergen Pines, and Norwegian, Lutheran Hospitals, an authority on poliomyelitis? A. Just as I stated a moment ago I could not accept every statement of anybody as authoritative.

Q. All right. Do you agree with this one, page 412, of the new edition:

> "The aims of Treatment are to save life, to relieve physical and mental discomfort, to minimize after effects, and to rehabilitate the patient"?

Do you agree with that? A. That is what we have dedicated our lives to.

Q. Do you agree with that statement that that is the purpose of early treatment, particularly "to minimize after effects" of the virus? A. In a hope to do so.

Q. No, in order to do so? A. No, sir.

Q. You don't agree with that? A. No, sir.

Mr. Rassner: That is all.

Mr. Gray: May it be conceded, Mr. Rassner, that Mr. McAllister has no deformity?

Mr. Rassner: No, it may not be conceded. He has deformity. I offered to have him examined by every one of the three doctors you called here, and that has been refused. I offered to have him examined before we came to court and that has been refused—and may the record show it.

The Court: Have you got any more witnesses?

Mr. Gray: Yes, I have.

1423

The Court: Do you want to ask Dr. Chaney any more questions?

Mr. Gray: Well, I think so.

Re-direct Examination by Mr. Gray:

Q. Doctor, could you look at Mr. McAllister now and form an opinion as to whether or not he has any deformity? A. I saw him walk.

The Witness: Is that he sitting back there (indicating) with the dark hair?

1424

The Court: Yes.

Q. Yes, sir. A. I should say he has some deformity, yes. I saw him walk out in the hall. Yes, I think he has some deformity.

Mr. Gray: That is all.

Mr. Rassner: No further questions.

Mr. Gray: Thank you, Doctor.

(Witness excused.)

The Court: We might take a recess for a few minutes.

1425

(Short recess.)

Mr. Gray: Mr. Moxhay.

JACK MOXHAY, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Gray:

Q. Mr. Moxhay, where are you now employed? A. In the office of the district attorney, Westchester County.

Q. In the year 1945—

1426

Mr. Rassner: May we have his capacity, Mr. Gray?

Q. What is your present capacity? A. Record clerk.

Q. In July of 1945 where were you employed? A. At the Cosmopolitan Shipping Company.

Q. Where were their offices? A. At 42 Broadway.

Q. And in what capacity were you employed by the Cosmopolitan Shipping Company, Inc.? A. In charge of the crew personnel department.

1427

Q. We are interested now in the steamship Edward B. Haines which was a W. S. A. vessel allocated under a General Agency Agreement to Cosmopolitan Shipping Company, Inc.

At that time did you have any other vessels in that same category?

Mr. Rassner: Now, that is objected to, your Honor. It is of no importance.

The Court: Objection sustained.

Q. Do you remember the method which was in use in July of 1945 in obtaining and hiring the officers and crew of the S. S. Edward B. Haines? A. Yes.

1428

Q. Will you please describe to the jury in your own words the procedure that you followed in obtaining the officers and crew for the Edward B. Haines, starting from the instructions which you first received to obtain a crew.

The Court: Haven't we already got that? It ordinarily is done through the union hall, isn't it?

Mr. Gray: Well, I want to have the record show just exactly what is the procedure.

The Court: All right.

Mr. Gray: By the man who did it.

A. Does this apply specifically to this particular voyage and ship?

Q. Yes, it does apply to this particular ship and this particular voyage. A. Well, I have discovered that I was on vacation at that particular time so that I did not have anything to do with the manning of this particular voyage, but the procedure is the same.

Mr. Rassner: Now, that is objected to.
The Court: Yes.

Q. Do you know what the procedure was at that time?

Mr. Rassner: If the Court please, I presume 1430
either we have it in the case right from the articles, and the testimony—

The Court: I do not think it makes much, if any, difference one way or the other. I cannot see any reason why he cannot tell what the ordinary procedure is. I do not see any reason why he cannot say that the ordinary procedure was applied to this vessel, to wit, this vessel, and then we will get through with this case.

Mr. Rassner: All right.

Q. Are you familiar with the ordinary procedure of 1431
crewing and manning a War Shipping Administration vessel? A. Yes, indeed.

Q. Will you please state what that procedure was? A. Well, it varied, depending upon whether the personnel needed were unlicensed or licensed, but in the case of, we will say, an engineer, an order would be received from the ship, probably from the chief engineer or the first assistant; if the chief engineer was unable, for instance, to come to the office; he would have the first assistant call our office and say that he required an assistant engineer. Upon receipt of that order we would place orders with two organizations, the M. E. B. A., which was the engineers' union, and with whom we had an agreement, and with the

recruitment and manning organization of the War Shipping Administration, which furnished licensed officers who were not necessarily members of the union. Either one would furnish. If the War Shipping Administration's office furnished the man he was sent by them to the M. E. B. A. for clearance, and then sent by them to our office. If the M. E. B. A. furnished the man directly—

The Court: I do not like to interrupt, but what is the M. E. B. A.?

The Witness: Marine Engineers Beneficial Association.

Q. That is the engineers' union, is it not? A. That is the engineers' union with whom we had a contract.

Q. It is the N. M. E. B. A.? A. Yes.

Q. Now the man is sent to your office by the N. M. E. B. A.? A. Yes.

Q. What does he do when he gets there? A. Upon arrival he presents his card of introduction and is given a service record form which he fills out, the face of which gives certain personal information about him, and his license which qualifies him for the job; and on the back he lists his experience, that is, the ships that he has recently been employed upon, the periods and the rating in which he served.

From there, if one of our port engineers happens to be in the office at the time we take him to the port engineer who further interviewed him. If the port engineer was not there, then the next step was to send him to the medical service, medical department, which was at that time operated by the War Shipping Administration, for physical examination. If he passed that he reported back to our office and was given a letter of introduction, a form which in substance was addressed to the captain of the ship and said, "We are"—"This will introduce Mr. So and So, who

is reporting to your vessel as such and such a rating, subject to your approval."

Q. And then— A. And then the man proceeded to report to the chief engineer, if he were an engineer.

Q. And thereafter he would sign the articles? A. Yes.

Q. And that was the usual custom—

Mr. Rassner: I will concede it was the practice adopted in this case.

Mr. Gray: All right, that is all.

Cross Examination by Rassner: 1436

Q. I would like you to enlighten us on a few other points. When you say "we" you are talking of the Cosmopolitan Steamship Company, Inc.?

Mr. Gray: "Shipping Company."

Q. —Cosmopolitan Shipping Company, Inc., aren't you? A. Well, I was talking about my particular department, myself and my assistant.

Q. Of that company? A. Yes.

Q. Employed by that company?— A. That is true.

Q. There is no question about whom you were employed by, is there? A. No. 1437

Q. Now your company had a contract with various unions that you would get all your employees from these unions, is that right?

Mr. Gray: That is objected to because this contract speaks for itself, and I know the terms of the contract because I helped draw it.

The Court: You may have to have some interpretation of the language then.

Mr. Rassner: Well, I am not going into details.

Q. All I asked is, you have had contracts with the union that they would supply men to your company?

1438 *Jack Moshay—Cross.*

Mr. Gray: That is objected to. This witness does not know.

The Court: Well, that is so.

Mr Rassner: I thought he so testified.

Mr. Gray: I may state that the contract with the union was executed by the Cosmopolitan Shipping Company, Inc. on behalf of the War Shipping Administration in this case.

Mr. Rassner: Now I move that that testimony be stricken out.

The Court: Yes, strike it out.

1439

Mr. Rassner: As not having been given by a sworn witness.

Mr. Gray: I will swear to it.

Mr. Rassner: And that the jury be instructed to disregard it.

The Court: Anyway, this particular man came from the union hall, did he not?

The Witness: I cannot answer that, because I was on vacation and I don't know.

Mr. Rassner: If your Honor please, I realize that it is of little importance here.

The Court: It is not important.

1440

Mr. Rassner: But I do feel that our appellate courts have not been made aware of the actual acts that transpire, and for that reason I would like to ask the Court's indulgence, so that if the question is reviewed they can see what actually takes place and not get a lot of theory. That is the only reason.

The Court: I do not know what it is you want. What is it that you want?

Q. Your company has a written contract—

Mr. Gray: That is objected to. The contract speaks for itself. We have no written contract.

The Court: He can say if he knows whether it has a written contract with the union.

Mr. Rassner: That is my point.

The Court: Which is called M. E. B. A.?

Mr. Rassner: M. E. B. A.

Q. —where they provide you with officers and men in the engine department, is that right? A. They provide officers upon request. Now may I go on—

Q. All I asked you is, do you have a contract with them for that purpose? A. Yes.

1442

Q. All right. You have a contract with the N. M. U.—National Maritime Union—to supply crew members? A. That is right.

Q. And stewards, men for the stewards department, is that right? A. That is right.

Q. And the contract is between your company and the unions, isn't that so? A. No—

Mr. Gray: That is objected to.

Mr. Rassner: All right.

Q. In any event, you have contracts with them, is that right?

1443

Mr. Gray: When you say "you", that is too ambiguous.

Mr. Rassner: Cosmopolitan.

Mr. Gray: Let us get it straight. You are trying to make something of this. Let us get the truth in the record. I will send down and get the contracts if you like.

Mr. Rassner: It might be advisable.

Q. In any event, you have contracts with the union whereby they provide men to the Cosmopolitan Shipping

Company for the ships operated by the Cosmopolitan in whatever capacity they are?

The Court: I will let him answer, if he knows.

Q. Is that so?

Mr. Gray: That is objected to because it is indefinite and it says "you". This witness hasn't any—

Q. I am talking of "you" in the sense of the Cosmopolitan Company.

The Court: Let us get on.

Q. Is that right? A. I believe there were contracts of that type, yes—in connection with the engineers, you mean, or with all?

Q. With all of the people that manned the vessel, with the exception of the master? A. Well, at that time I don't believe we had one with any union of mates or masters.

Q. We will just eliminate mates or masters; with everybody else, is that right? A. Yes, sir.

Q. That is the way the vessels were manned; that is how you got your manpower? A. Not exactly. We didn't get all our men right from the unions, if I may explain.

Q. Yes. A. In the case of the M. E. B. A., if we had available men who had been employed by us previously as engineers, or even if a man came into our office and applied for a position as an engineer and his papers were in order, and we wished to hire him, we were permitted to do so if we sent him to the union for clearance, or if he were actually a paid-up member of the M. E. B. A., we did not even have to have him cleared.

Q. When you talk of "we" you mean Cosmopolitan Shipping Company, Inc., is that right? Is that whom you

refer to as "we"? A. Yes. When I say "we" I am talking about the company for which I worked.

Q. All right, you have answered my question.

Now I would like you to clarify one or two items, if you will, and then I am through with you, so far as cross-examining you is concerned.

Are you acquainted with the terms of the General Agency Agreement? A. No, not to any extent.

Q. Let me ask you this, if a man takes sick or is injured in the service of the vessel, you know that it is the general custom of the trade that he be given maintenance and cure while he is receiving out-patient treatment, isn't it? 1448

Mr. Gray: That is objected to.

The Court: Objection sustained.

Q. Well, is there a general method of conduct by all steamship companies, such as the Cosmopolitan, that when a man takes sick or is injured in the service of the vessel, that the steamship company pays him some money while he is receiving out-patient treatment for his maintenance and cure?

Mr. Gray: That is objected to. 1449

The Court: Objection sustained.

Q. Do you know whether there is such a practice?

Mr. Gray: That is objected to.

The Court: Objection sustained. That is the law, and it is generally done.

Mr. Rassner: Well, that suffices for my purpose.

Q. Now that money is paid—when money is paid to a seaman for his maintenance, is it paid by cash or check—

Mr. Gray: That is objected to—

Q. —by your company?

Mr. Gray: That is objected to. This witness is not qualified.

Mr. Rassner: If he knows. If he does not know, of course not.

The Court: Objection sustained.

Mr. Rassner: Well, there is no point of going any further. I thought I would be able to get into the practical mechanics of what is being done.

Off the record.

(Discussion off the record.)

Mr. Rassner: That is all.

Mr. Gray: Thank you, Mr. Moxhay.

(Witness excused.)

Mr. Gray: The defendant rests.

The Court: Defendant rests.

Now you have something more?

Mr. Rassner: Yes. I would like to call one witness, Mr. Jackson, who is on a ship. He is due here. He hasn't arrived as yet, I understand, and I will only be a few minutes with him.

Dr. Cusack, who is still in a criminal case, he is still on the stand. Of course if he does not come in here by Monday morning—I would be with him five or ten minutes at the most, but if he does not come in I will stop with what I already have.

I would like the Court's indulgence for about fifteen more minutes on Monday, that is all.

The Court: How about this other witness?

Mr. Rassner: Jackson would only be two or three minutes.

The Court: What is he going to say?

Mr. Rassner: Corroboration. He is another witness.

The Court: What is he going to say?

1453

Mr. Rassner: The same thing as the other witnesses.

The Court: Why not stipulate that if he were called he would say the same thing.

Mr. Gray: Well, there is a conflict between these witnesses. I would like to know on which side he is going to talk.

Mr. Rassner: I don't think that comment is necessary.

Mr. Gray: It is accurate.

Mr. Rassner: I won't comment on that.

1454

The Court: Why not let Mr. Gray see the statement and maybe he will stipulate that.

Mr. Rassner: I showed it to him before lunch.

Mr. Gray: Not Jackson.

Mr. Rassner: I think it was Jackson if I am not mistaken. I would like to offer the statement in evidence and save the trouble of calling the witness (handing to Mr. Gray).

Mr. Gray: I object to this.

The Court: Well, we are not getting anywhere on that.

Mr. Rassner: I still have to ask the Court's indulgence. It will only be a few minutes with Jackson, if he shows up. I cannot get a stipulation.

1455

The Court: You cannot get him this afternoon?

Mr. Rassner: No. He may be in this afternoon. That is why I asked, as long as the case is going over until Monday.

The Court: I thought you had an idea that he was coming here this afternoon.

Mr. Rassner: No. He is coming to town.

The Court: I suppose we can dispose of these motions then this afternoon on the assumption that both sides have rested.

Mr. Rassner: Yes, I will rest for the purpose of all motions.

The Court: Well, I will excuse the jury until half past ten Monday morning.

(Jury excused at 4:05 p.m.)

Mr. Rassner: I would like to read from the examination of the defendant before trial, the following questions and answers—the deposition was taken on November 10, 1947, at the office of the attorneys for the defendant at 42 Broadway, the testimony of Norman Randell, who was the insurance manager for Cosmopolitan Shipping Company. He testified as follows on page 14:

"Q. Does he owe you any money exclusive of maintenance? A. He received his wages up to the 29th day of July, 1946, the end of the voyage.

"Q. From that you deducted any money that you had previously advanced? A. Yes.

"Q. No maintenance? A. Advance against money due or to become due."

And then of course other questions follow.

"Q. From that you deducted any money that you had previously advanced?"—that is referring to his wages—"up to the 29th of July, 1946?" and the answer is "Yes."

So that he received, may the record show—

The Court: It does not help at all.

Mr. Rassner: May the record show that Mr. McAllister was paid his wages up to the 29th day of July, 1946, and that he received no maintenance?

Mr. Gray: That was the end of the voyage of the vessel.

Mr. Rassner: Let us first get one thing.

Mr. Gray: That is what it says here.

The Court: He testified to that, that he was fully paid to the end of the voyage. Now you have the time when the voyage ended.

1459

Mr. Gray: And he received maintenance and cure in kind up until—

Mr. Rassner: The 1st of December.

Mr. Gray: No, up until he left the Marine Hospital in Staten Island and went to Bellevue.

Mr. Rassner: Yes, I will agree to that. May 9th, 1946, and he testified that the amount of maintenance is $50 a week.

Mr. Gray: That is before he joined the ship.

Mr. Rassner: During his stay ashore in this country.

1460

The Court: There is nothing against it?

Mr. Rassner: That is right. We just checked it.

The Court: It was generally stipulated $3.00, and then they got it up to $5.00 a day.

Mr. Gray: Judge Knox fixed it, I think, at $4.50.

Mr. Rassner: And $7.50 also in a case of mine, so I would just as soon leave it to the jury without stipulating as to the amount. The testimony here is $50 a week.

The Court: Now you still haven't answered my question as to how much, if the jury is told, if he recovers, that he is entitled to recover as an element of damages for his wages up to the time of the trial, his lost wages. How much are you going to figure?

1461

Mr. Rassner: We are going to figure at $320 a month, from the close of the voyage up to the present time.

The Court: I do not know if that is so or not. I do not know whether he had a great deal of overtime work—

Mr. Rassner: No, that does not include war bonus. That was after the war. That is $320 a month.

Mr. Gray: I think he was in a war area. You had better check that up.

The Court: You say it is $320?

Mr. Rassner: $320 a month.

Mr. Gray: While he was on the ship, which included $100 a month overtime.

Mr. Rassner: That is right.

Mr. Gray: Well, it does not necessarily mean that he would get overtime all the time.

Mr. Rassner: No, but that shows his average earnings, of course. That is a question of fact.

The Court: All right.

Mr. Rassner: There is no proof to the contrary.

The Court: Now what else is there? I suppose there is this question of the Hust case, and I do not know that I want any argument about that.

Mr. Gray: Except I would like to have the record show that I move to dismiss the complaint upon all the evidence.

The Court: I guess you had better wait until both sides rest on that.

Off the record.

(Further discussion off the record.)

(Adjourned until Monday, February 9, 1948, at 10:30 a.m.)

New York, February 9, 1948, 10:30 a. m.

TRIAL RESUMED.

Mr. Rassner: I would like the record to show, if I may, that Mr. Jackson is on the American Banker of the U. S. Line. We have been unable to get him down to court.

I would like the record to further show that Dr. Thomas Cusack has been called by the district attorney's office in a murder case as a rebuttal witness

1465

for this morning, and he won't be able to be here this morning.

Now in order to avoid having my associate take the stand, I would like Mr. Gray to let the record show that I have been in touch with the Chinese Consulate's office, and about two weeks ago I had him send a cable to Shanghai, China, to the Public Health Service, requesting them to forward to us by cable the number of polio cases treated down there during the months of October, November and December 1945. I understand that up to this morning they have not received any response by cable or otherwise and with that the plaintiff rests.

1466

Mr. Gray: I have Mr. Ackerman here with the contract with the M. E. B. A., the engineers' union, and I should like to have the record show clearly just in what manner that contract was made, because when Mr. Moxhay was on the stand—

Mr. Rassner: You do not have to go any further. If you have the contract, offer it and I will have no objection.

Mr. Gray: All I want to read is the persons between whom the contract was made. I am reading from this contract:

1467

"This agreement, made April 6th, 1945, by and between National Marine Engineers' Beneficial Association (hereinafter referred to as 'Association,') and Cosmopolitan Shipping Company, Inc., as General Agent for the War Shipping Administration (hereinafter referred to as the 'General Agent').

"Witnesseth"—and then the rest of the contract goes to the rates of wages, working conditions, scales, and so forth.

(Mr. Gray hands to Mr. Rassner.)

Mr. Rassner: I would like to read this last part:

"Section 4. Authorized representatives of the

Association shall have the right to go on board ships covered by this agreement at all reasonable times, subject to military regulations and any other regulations mutually satisfactory to the Association and the General Agent, for the purpose of consulting with the engine room officers employed thereon.

"The Association shall take out insurance which will protect the shipowner, charterer, operators, and the General Agent and subsidiary or affiliated companies against any claims, loss of life, or injury occurring to a representative of the Association while on the property or while on board a vessel allocated to any of the above mentioned assured while said property or said vessel is owned, chartered, or leased, by or to either and shall furnish satisfactory evidence of such insurance to each of the said assured."

Section 8. "Hours of labor in port: Eight hours shall constitute a day's work."

Section 9. "Work by regular crew members after midnight: When watches are broken and assistant engineers work overtime in port after midnight, they shall have a rest period during straight time hours on the same day of one hour for each hour's work performed after midnight; provided, however, that on days of departure such rest period shall not interfere with the assistant engineers standing their regular watches."

Section 18: "Subsistence and room allowance in port: When in port if board and living quarters are not furnished, subsistence allowance amounting to $3.50 per day ($1.00 for breakfast, $1.00 for lunch, and $1.50 for dinner), and a room allowance of $2.50 per day shall be paid each licensed engineer officer."

Your Honor, I would like to call your Honor's

attention that that answers the question that has arisen. It is $6.00 a day according to the agreement. 1471

The Court: $6.00 a day for what?

Mr. Rassner: For maintenance and lodging.

Mr. Gray: That is not correct.

Mr. Rassner: It isn't? Subsistence and room allowance in port, is what I have read to your Honor, and it amounts to $6.00 a day.

The Court: The only testimony in the case that I recall on the question of maintenance is the plaintiff's own testimony that it cost him about $50 a week to live. 1472

Mr. Rassner: That is correct.

The Court: Now do I understand that you are willing to stipulate that if there should be maintenance it should be at the rate of $6.00 per day?

Mr. Rassner: $6.00 per day, that is, exclusive of cure. That is straight maintenance, yes.

The Court: No objection to that?

Mr. Gray: No objection to that.

Mr. Rassner: "Section 25. Rest before watch: No licensed engineer shall be required or permitted to take charge of a watch upon leaving or immediately after leaving port, unless such officer shall have had at least six hours off duty within the twelve hours immediately preceding the time of sailing." 1473

"Section 29. Repatriation: If the ship is withdrawn from service for any cause or is destroyed, or if the licensed officer is discharged, except for breach or neglect of duty, at a place other than the port at which he signed articles for the voyage during which, or at the termination of which the ship is so withdrawn or destroyed, he shall be furnished first-class transportation with meals and berth and shall be paid full wages to the home port of the ship or to the port where he signed such articles

(for the voyage), as mutually agreed, provided, however, that in case the vessel is destroyed and first-class transportation is not available, the General Agent will, in lieu of first-class transportation, cooperate with the authorities repatriating the distressed licensed officer in the best available manner to a United States continental port, and if the port to which he is so repatriated is not the port for which he signed articles for the voyage, he shall also be furnished first-class transportation with meals and berth and paid full wages to the home port of the ship or to the port where he signed the articles, as mutually agreed."

The Court: Well, I do not like to interrupt you but I am wondering how any of those provisions have anything whatever to do with the fact issue in this case, which is going to be submitted to the jury. Certainly there is no contention or no evidence in the case that I have heard to the effect that the plaintiff was not properly repatriated and brought back to the United States and paid in full the amount of his wages up to July 29th, when the vessel arrived back here at the end of the voyage.

Mr. Rassner: We have the factual issue in the case which, with the Court's permission, I will argue to the jury, it was not first-class accommodations; anything but, in getting him back from the ship to the United States, and that it was a violation of the contract as well as of the legal obligation.

Mr. Gray: I also would like to have it appear on the record—

The Court: What is this, a contract between whom?

Mr. Gray: The contract between the Engineers Union—

The Court: Between the union—

1477

Mr. Gray: And the War Shipping Administration which Cosmopolitan executed as the agent for the War Shipping Administration.

The Court: All right.

Mr. Rassner: Do you mind if we make a correction there, your Honor? I would like to read what it says.

The Court: I understand. The agreement is in evidence and anybody can read anything that he wants.

Mr. Rassner: That is right, and I would like to have it read instead of Mr. Gray's interpretation of it, so that the jury can decide what it is.

1478

In order to obviate any question, I consent to the contract going in evidence and let the jury see the whole thing.

Mr. Gray: I am not offering the contract in evidence.

Mr. Rassner: Then I will. I offer the contract in evidence, your Honor. It has been read from and I offer the contract.

Mr. Gray: No objection.

The Court: All right.

1479

(Marked Plaintiff's Exhibit 9.)

The Court: Have you any more witnesses, Mr. Gray?

Mr. Gray: No, sir.

The Court: Then both sides rest, is that right?

Mr. Rassner: May I have just one moment, your Honor.

(Mr. Rassner confers with the plaintiff.)

Mr. Rassner: I would like Mr. McAllister to take the stand again.

1480 *Robert A. McAllister—Rebuttal—Recalled, direct.*

ROBERT A. MCALLISTER, the plaintiff, recalled in rebuttal, testified as follows:

Direct Examination by Mr. Rassner:

Q. Mr. McAllister, how long did you have to wait for transportation back to New York, from San Francisco, after arrangements had been made for your transfer from the Marine Hospital at San Francisco to the Marine Hospital at New York? A. It was approximately about a week and a half. The Army was going to take me back
1481 and they had to wait—it's up to the Army until they could find a berth for me.

Q. Do you know of any arrangements being made or undertaken to have you brought back by first-class passenger plane? A. Not that I know of.

Mr. Gray: From where to where?

Q. From any place to any place, since the time you got sick? A. No, not that I know of.

Q. It was always waiting for the Army or the U. S. Government to provide transportation for you, is that
1482 right? A. That is correct, Mr. Rassner.

Q. And when you came back by ship, whose ship was it? A. United States Navy ship.

Q. It was a United States Navy ship; it was not private first class passage? A. No, it was not.

By Mr. Gray:

Q. What do you call first class passage? A. What do you call first-class passage?

Mr. Rassner: I object to that as immaterial.

The Court: I will let him answer. I do not think it makes much difference.

Mr. Rassner: I do not think the witness would be qualified.

Mr. Gray: Then I ask to strike out his answer. 1483

The Witness: I will answer it, Mr. Rassner.

The Court: I will allow it.

The Witness: Here is what I believe. I did not belong to the Army or Navy—

Mr. Gray: Wait a minute. We are asking you what you consider first-class passage.

The Witness: That is what I am giving you. I do not think they supplied it to me, and I thought it was first-class passage for civilians—

Mr. Gray: I move to strike it out. Will you tell us what you consider first class passage. 1484

The Witness: On a private owned vessel.

Mr. Gray: You got your meals, didn't you, on board the APA?

Mr. Rassner: That is objected to as argumentative.

The Court: I will assume that he did. It wasn't an easy time around the end of 1945 and the commencement of 1946 to travel around the world.

Mr. Rassner: May I object to your Honor's comments? It puts me in an embarrassing position.

The Court: I think the jury will take judicial notice of that even if the Court cannot. 1485

Mr. Rassner: Well, I do not agree with your Honor. I think it was up to the defendant to provide him with what they are supposed to. There were plenty of private passenger ships if they wanted to pay for it.

The Court: I do not want to conclude you in any case but it seems to me this is hardly—

Mr. Rassner: Except I think your Honor, by your comments, is mitigating the amount of the damages, and are asking for $275,000, and any comment which might tend to influence the jury to give us a lesser amount is objectionable, and I take ex-

ception to it. I am sorry I have to do that to this Court.

The Court: Well, I do not think it will influence the jury one way or the other. The responsibility is theirs and theirs alone when it gets to the jury.

Mr. Rassner: Therefore, I take exception to your Honor's statement that these were hard times or difficult times or that he could not get the best passenger service or the attendance of a doctor and a nurse or whatever he needed.

The Court: I do not think I made any such statement.

Mr. Rassner: Well, that was the impression I got, your Honor.

The Court: All right.

Mr. Rassner: And I ask your Honor to instruct the jury to disregard your Honor's comment.

The Court: I will ask them to disregard everything that I said.

Mr. Rassner: All right.

Cross Examination by Mr. Gray:

Q. Do you know of any privately operated passenger vessels that were in service in the Pacific Ocean—

Mr. Rassner: That is objected to. I think the Cosmopolitan is the one to testify to that.

The Court: Sustained.

Mr. Gray: Is that sustained, your Honor?

The Court: Yes.

Q. Did you remain in your bed all the time from the time you left Guam until you arrived in San Francisco on the APA? A. That is correct.

Q. That was a Navy vessel? A. That was a Navy vessel.

Q. And you were served your meals in bed? A. That is correct.

Mr. Gray: That is all.

Mr. Rassner: No further questions, Mr. McAllister, thank you.

Mr. Rassner: Plaintiff rests, your Honor.

The Court: Both sides rest?

Mr. Gray: Just a minute, your Honor, I have 1490
another witness here.

The Court: What?

Mr. Gray: I have a witness here, and I would like to rebut this testimony.

The Court: All right.

Mr. Gray: Mr. Randell, will you please take the stand.

NORMAN RANDELL, called as a witness on behalf of the defendant in sur-rebuttal, being first duly sworn, testified 1491
as follows:

Direct Examination by Mr. Gray:

Mr. Rassner: Would your Honor care to have the requests to charge (handing to Court).

Q. Mr. Randell, are you the claim agent for the Cosmopolitan Shipping Company, Inc.? A. Yes.

Q. Did you have anything to do with repatriating Mr. McAllister to the Marine Hospital at Stapleton, Staten Island? A. Yes.

Q. It has been testified to here that his transportation and the arrangements for his transportation from San Francisco were insisted upon and procured by some union agent; is that correct? A. I don't know what the union agent did. I know what I did.

Q. What did you do? A. When I heard that he was in San Francisco, I knew that his home was in the East, and that his wife lived I believe in Pennsylvania. I started to get him moved from the Pacific Coast to some Eastern hospital where it would be more convenient for his wife to visit him.

1493

I wrote to the hospital on the West Coast to find out about his transfer, and was told that transfer arrangements would have to be made with the hospital to which he was to be transferred.

As his home was in Pennsylvania, I figured that it would be better for him to be in a hospital in Baltimore. I got in touch with Washington and with the hospital in Baltimore, and that was pretty well arranged for him to get the Baltimore—

Mr. Rassner: That is objected to, the characterization as to "pretty well arranged."

1494

The Court: I will let it stand.

Mr. Rassner: Just what we claim was not done, and this is a conclusion.

A. (Continuing) And then I received word that Mr. McAllister would prefer to be in Stapleton, and then I started making arrangements to have him enter in the hospital in Stapleton, Staten Island.

Q. And what means of transportation did you provide from the West Coast to Stapleton?

Mr. Rassner: If any. I object to the form of the question unless it is stated "if any."

1495

Q. If any. A. He was to get first-class transportation—

Mr. Rassner: That is objected to.

Q. Did he come by air or rail—

Mr. Rassner: I object to that, too, unless it is—
The Court: Yes.

A. I do not recall whether he came by rail or air.

Q. Were you under pressure from any union agents to provide for his transportation? 1496

Mr. Rassner: Objected to.
The Court: Sustained.
Mr. Gray: That is all.

Cross Examination by Mr. Rassner:

Q. You were supposed to provide first-class transportation for Mr. McAllister from the West Coast to the East Coast, weren't you?

Mr. Gray: That is objected to as immaterial. 1497
The Court: Sustained.
Mr. Rassner: Very well.

Q. Did the Cosmopolitan Shipping Company, Inc., provide any transportation for Mr. McAllister from any port to any other port or to any city or any other place?

Mr. Gray: When?

Q. From any time—from the time he took sick? A. The transportation was arranged by the hospitals.

Q. Is that my question. Did I ask you who arranged

it? Or wasn't my question clear? I am awfully sorry, I thought I made it very simple. I asked you, did the Cosmopolitan Shipping Company— A. I can hear you.

Q. —arrange—well, you do not seem to understand it. I thought maybe you did not hear me. A. I did not arrange it.

Q. You did not arrange any transportation? A. No.

Q. Thank you, sir. That answers my question.

The Court: Are you employed by the Cosmopolitan?

The Witness: Yes, your Honor.

The Court: All right.

Mr. Rassner: Thank you, sir.

The Court: Is that all now, Mr. Gray?

Mr. Gray: Yes, that is all.

The Court: Both sides rest again. Now you have some motions, I suppose?

Mr. Gray: Yes.

The Court: And you would rather like to make those motions outside the presence of the jury?

Mr. Gray: Yes.

The Court: I will excuse the jury for a few minutes.

(Jury leaves courtroom.)

The Court: All right, Mr. Gray.

Mr. Gray: The defendant moves that the complaint be dismissed for failure to prove a cause of action or cause of action alleged.

The Court: That is a general motion?

Mr. Gray: Yes.

The Court: I will deny that motion.

Mr. Gray: And I also move that the Court direct a verdict for the defendant on both causes of action alleged in the complaint.

The Court: Denied.

Mr. Rassner: I join in the motion on the maintenance count and ask that a directed verdict in favor of the plaintiff be made by the Court, leaving the amount to be fixed by the jury.

1501

The Court: Denied.

Mr. Gray: I also move to dismiss the complaint; the first count of the complaint on the ground that the defendant is not subject to the Jones Act in this action.

The Court: Denied.

Mr. Gray: I move that the second count in the complaint be dismissed on the ground that the defendant is not an employer, neither as the owner of the vessel nor as the owner pro haec vice of the vessel?

The Court: Denied.

Mr. Gray: That is all, your Honor.

1502

(The jury returns to the courtroom.)

(Mr. Gray summed up to the jury, during which the following occurred:)

Mr. Gray: If he was, he could have gone ashore to have seen a doctor—

Mr. Rassner: That is objected to.

The Court: I am afraid I did not hear it.

Mr. Gray: I merely pointed out to the jury, your Honor, that Mr. McAllister could have gone ashore and seen a doctor himself from the 11th of November to the 23rd of November when the vessel was in port.

Mr. Rassner: If anything, that would constitute contributory negligence and contributory negligence is not in the case. He may not be charged with any fault.

1503

The Court: I will let the statement stand.

Mr. Rassner: I take exception, your Honor, on the ground that that charges McAllister with contributory negligence, which has not been pleaded in the case and which by law is not imposed as an obligation on the plaintiff to prove that he was free of contributory negligence.

The Court: We have already discussed that and it is my understanding that contributory negligence is not in the case. With that statement I will let Mr. Gray argue the case in his own way.

Mr. Rassner: Then don't you think Mr. Gray has no right to comment on it?

The Court: All right.

Mr. Rassner: And influence the jury indirectly by something he cannot do directly.

The Court: I understand your point.

Mr. Gray: Now to go back, Mr. McAllister, if he was sick, could have gone ashore and seen a doctor—

Mr. Rassner: If your Honor please, I think that is adding insult to injury. I object to it.

The Court: You have already objected to it and I have ruled that Mr. Gray can argue the case to the jury in his own way.

Mr. Rassner: Exception.

Mr. Gray: Now let us go back again to the 24th. You see, ladies and gentlemen, there is a very serious question here of credibility. It rests wholly in your province to decide who is telling the truth.

(Mr. Gray continues with his summation, until the following occurred:)

Mr. Gray: * * * they lost control of the vessel.

Mr. Rassner: If your Honor please, the question of control is one of law. For all purposes, as I understand the law, this defendant is considered to be the owner. If I am right, I would like my objection sustained.

The Court: I am not going to get into any discussion on that except to tell the jury that this is a case against the Cosmopolitan Shipping Company, Inc.

Mr. Rassner: I am sorry, your Honor, I do not think that is sufficient. That so far as the jury is concerned—

The Court: They are not concerned with that legal question.

Mr. Rassner: That is right.

Mr. Gray: Of course I can comment on the evidence. The evidence is before the jury, your Honor.

The Court: I am willing—

1507

Mr. Rassner: Then I take exception if Mr. Gray is permitted to argue at all in the slighest on the question of control. I take exception. He is talking about where the agent was, where the ship was. That is a question of control and that is a matter of law. The master was there. That is all we are concerned with.

Mr. Gray: The evidence before you ladies and gentlemen is that the main office of the defendant, Cosmopolitan Shipping Company, Inc., is at New York—

Mr. Rassner: I am sorry, your Honor. I think we are going into a question of law.

1508

The Court: You do not deny that, do you? A. I do not think it has anything to do with it, where the main office is.

Mr. Gray: It is a fact which I would like to call to the attention of the jury.

The Court: All right, go ahead.

Mr. Gray: The main office of this company, the Cosmopolitan Shipping Company, Inc., the agent for the United States, was at New York. I do not think any argument is necessary. I am only stating to you the facts, and any question of law will be argued to his Honor.

(Mr. Gray continues with his summation until the following occurred:)

1509

Mr. Gray: When the vessel left New York, the Cosmopolitan Shipping Company had no control over the vessel.

Mr. Rassner: That is objected to. I think it is highly prejudicial, and we are going into the question of control. If that is so, then we have no case. If that is so, we do not belong here.

The Court: I do not think that is at all important to the issue that is before the jury.

Mr. Gray: Well, I think there are other features here, your Honor—

The Court: There are other features with respect to routing the man back from the East. That was raised here

this morning in connection with the last witness who was called. I do not see that it has anything to do with the case, really.

Mr. Gray: And I also wish to point out that the orders for the movement of Mr. McAllister back to the United States were given by the Navy Department.

Mr. Rassner: If the Court please, we are going into a question that he has no right to comment on.

Is my objection sustained, your Honor? Mr. Gray is commenting on questions of control, supervision and direction of the vessel.

The Court: I rule in your favor on that, that he should not.

Mr. Gray: All right. I beg your Honor's pardon. I thought I was stating the facts without any argument and let the facts speak for themselves.

The Court: I thought it had some bearing on the question which was raised this morning, which I still think only indirectly is involved in this case.

(Mr. Gray concludes with his summation.)

The Court: Do you want to go ahead now or do you want to take a recess?

The Jurors: We have had a recess.

Plaintiff's Summation.

Mr. Rassner: Judge Coxe, Madam Forelady, Ladies and Gentlemen of the Jury: The last remarks of my friend, Mr. Gray, mirrored me in a guise with which I am rather unacquainted—the Big Bad Wolf. Be careful that he doesn't bite you! Well, I am not quite as vicious as all that. As a matter of fact, I may be a little boring, but I am dealing with a technical problem, you see, and I hope that you will pardon me if I do tax your patience somewhat.

Of course you are fully aware that comments on my part seem to be out of place as to the fact that you are here

serving one of the greatest duties, and by the same token, privileges, which a human being is ever afforded. You are sitting here as judges between two Americans, Mr. McAllister and the Cosmopolitan Shipping Company. Your function in ascertaining the truth and in doing justice accordingly is just as great. It should be just as evenly handed out as is his Honor in passing on the law.

Now a problem is presented to you and you see me jumping up most of the time when Mr. Gray was before you, and sometimes the jury forgets whose case is being tried. A contest is very apparently in the minds, sub- 1514
consciously, of couse, between the two attorneys. Now there is no such thing. You see, after this case is over, Mr. Gray goes to work on the next one and I go to work on my next one—not Mr. McAllister. His entire future depends on what you do with him today. This is a lawsuit between Mr. McAllister and the Cosmopolitan Shipping Company. I wish you would bear that in mind. Forget about Mr. Gray and forget about me. We are doing a job. Mr. Gray is doing it as well as he can; I am doing it as well as I can, and the angels can do no more.

Now if I have conducted myself in a manner which you do not approve of, forget it. I am only the lawyer. It is 1515
Mr. McAllister who is on trial, you see. Forget what I have done. I am just doing the job to the best of my limited ability.

Now let us look at the problem which is before you. It is a simple problem, not difficult at all. It is technical and lengthy but it is very simple. Unfortunately, you have not been given the privilege of listening to Judge Coxe, or for that matter any other Federal judge on frequent occasions, so that you are unacquainted with the law which is applicable here. Perhaps as long as the steamship company or the master sent Mr. McAllister over to the United States authorities, they have fulfilled their duties,

and it is just too bad that he has been so badly injured or disabled. However, I do take exception to Mr. Gray's comment that our Almighty God is responsible for this condition. I don't think that neither under the Old or New Testament we have been taught to believe that the Almighty delights in inflicting injury and pain upon His children down here on the earth below. He more or less, as I read the Old and the New Testament, gives this world to His humans with a free control over our own actions, and the results very often are consequences of our own deliberate, accidental, stupid or intelligent conduct. It is only later when we pass beyond the vale that we are called to account for our mistakes; but not here. Here a cause produces a certain effect. Suppose we leave our Creator out of this court. The justice to be administered here is human justice at your hands. And of course you will have to live with your own conscience to see whether or not you have done what is right.

Now I do not ask you to find in favor of Mr. McAllister at all, nor against him. I ask you to do what the testimony demands of you as sworn judges of the facts. I do not believe that any American jury is capable of doing less. I am rather proud of our American system of trying controversies between fellow Americans. Yes, there is a lot to be desired, a lot of improvement, but I know of no better nation, no better country and no better system, and that is the best we know of in our own limited human frailties, and it is pretty good. You have got twelve human beings listening to other people taking the stand, deciding who is telling the truth, and then evaluating the weight of the testimony.

Now Dr. Chaney, with his thirty years of experience, took the witness stand. I am just calling upon him as a type of witness. He is the almighty power, Socrates himself reincarnated. Perhaps if Hippocrates were brought back from the grave, the father of medicine, and I asked

Dr. Chaney, "Well do you agree with him?" he would say, "well, he is no better than the founder of the Hot Springs clinic, the Minneapolis clinic, the doctors who spent their lifetime in studying polio. No, I do not agree with him. I, Dr. Beverly Chaney, thirty years a neurologist, I'll tell you what it is." 1519

Well, that was his attitude. I mean that is one type of witness. Then you get Sister Kenny as another type of witness.

Now let us take the over-all picture. We have called every person that it was within our power to call, to give you a factual picture here. The defendant has denied everything, denied that they made this man lie in bed without treatment at all—just a complete denial; denied that it was negligent in any way. 1520

Now with the facilties at the disposal of the defendant, and insofar as we have in evidence the contract with its insurance company, with its international facilities—.

Mr. Gray: That is objected to, your Honor. There is no evidence that we had any facilities. I think that is an improper statement.

Mr. Rassner: All right, I apologize. The Cosmopolitan Shipping Company had no facilities. They couldn't get the master down here, they couldn't get their chief engineer down here, they had no facilities. They must have been prevented in some way from bringing the captain here. They had no facilities—if you believe that—they had no facilities to produce the chief engineer. They couldn't bring him down here. The Cosmopolitan Shipping Company did not have the facilities. They could not bring the master down, they could not bring the chief engineer down, they could not take the deposition of the master during the last two years that the case was pending. They could not take the deposition of the engineer during the last two years that the case was pending. You see, they did not produce them, so we must assume that they couldn't. Well, we 1521

could. Mr. McAllister, this poor seaman—and I say "poor" advisedly in more ways than one, he had the facilities of Mr. Dembo, the lawyer, to produce people that the Cosmopolitan Shipping Company could not produce, that they did not produce.

Linarty, the chief officer who came from the West into New York; the purser from Kentucky—oh, incidentally, the purser was called by the defendant. We had called him. We had written to him but he came up here in response to the defendant's request, came over to defendant's counsel's
1523 office. But we called him. We knew what the facts were. We weren't afraid to call anybody. Well, we called the purser from Kentucky.

Bullis, the first assistant engineer from Goshen, New York. Benz, the deck engineer from Cincinnati, Ohio.

McLeod, the oiler, from Paterson, New Jersey. Brodowske, from Philadelphia. Incidentally, Brodowske was not a very friendly pal of McAllister's, but he came here and told you the truth. We weren't afraid of who they were. We knew that if they came here we would get the facts.

Sister Kenny, from Minneapolis, Minnesota. The array of witnesses shows to you that we weren't afraid of getting
1524 the truth here before you. We did not hide anything from you.

Now, we come to one question where there has been some variance in the testimony. You see, the records show that Mr. McAllister was on duty after the 24th. We have tried to explain that to you. Now, in our complaint, as one of our causes of action, we say that the defendant is responsible for damages because "you made Mr. McAllister work after he was officially reported ill."

Then when we found out that they were not guilty of that charge, we, as gentlemen, withdrew that charge, you see. But they say "Let us use it for whatever it is worth. We will make believe that he is contradicting the records." We are not blaming them for making Mr. McAllister stand

duty, but just look how simple it would have been if he wanted to really rely upon an untruth. Here is a record—and they cannot deny it, it is their record—showing Mr. McAllister on duty working after he was officially reported ill. Now that is liability, simple, definite, and the plaintiff is entitled to win his case, but we do not want to win it on any such theory. He wasn't working, so we do not want to win it on that sort of theory.

There is an official report showing that he was ill and their report showing that he was working. That imposes liability, and Dr. Stimson said that if you make a man work after he is ill you aggravate any condition or disease or virus that may be in his body. We do not want to win it in that fashion. If we cannot win it on truth, we will stop coming here and we will stop asking you to find a verdict for them.

Now, let us analyze the facts. This defendant, so far as you are concerned, is the owner of the ship, and to treat with this defendant in any other respect is unfair and not in accordance with the law. His Honor has indicated that to you, and I do not doubt but he will tell you so in his charge, and it would be entirely beyond your authority, and certainly not an honest way of handling this case to consider this defendant in any other respect than the owner of the ship, legally, with all the privileges and all the obligations, so far as you are concerned.

The problem of law is one which his Honor is fully able to handle, and Mr. Gray and I can argue that out in due time, but that is not your province, and I ask you even not to discuss it.

Now, this is a lawsuit between a seaman, an officer of the ship in the engineering department, and the employer. His employer, so far as you are concerned, is the steamship company. He joins the vessel. He sails with the vessel. There is no incident until it arrives at Shanghai, China. At Shanghai, China, he does not feel well. He

stands his watches. Generally, throughout the vessel, particularly in his department, it is known by other people, so clearly known that as a matter of law there is a formal charge made against Mr. McAllister on the vessel's return voyage from Hong Kong to Shanghai, that Mr. McAllister was not working, and when Mr. McAllister is brought up on charges before the chief engineer he says "I am sick."

The words are of no consequence. I think his Honor will tell you that at that instant the responsibility shifted from McAllister to the defendant. He says he is sick. The defendant cannot gamble on whether he is shamming or not. I am charging the first officer with fault. He was our witness but I am charging him with fault just the same. He thought he was shamming. That is no excuse, no legal excuse. The chief engineer may have thought he was shamming, but that is no excuse. The steamship company is the guardian under our law.

You see, we had some pretty bad experiences, I mean since the day when pirates were running ships or where freebooters were running ships. I mean this is even within our own time. We have had some pretty bad experiences, and Congress, in its wise, experienced judgment, enacted a certain law in 1915 known as the Jones Act.

There was a man by the name of Dana up in Boston who sailed on a ship a few years, and then he wrote a book, "Two Years Before the Mast." You have probably read about it. And then he tried to get some legislation put through. Several lawyers and civic-minded people joined with him, and Congress passed the Jones Act based on the proposition—and our courts have upheld it right down to the present time—based on the proposition that seamen as a class are an improvident group, mentally incapable of taking care of their own rights, underprivileged people, so that it is necessary to provide guardians for them, and the courts have been made the guardians for seamen as a class.

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That law was passed in 1915, and then it was amended in 1920 to make it applicable to the officers and the master as well, so that when a person employed aboard a ship becomes ill or injured, the master becomes his guardian, and in dealing with Mr. McAllister the master was under a duty to treat him the same as though he was a child who says "I don't feel well." Then the child wants to run out and play, but the father and mother say, "You cannot do that. There is something ailing you." They cannot let him run out in the street.

That is the comparative degree of duty which his Honor no doubt will tell you that the master owes to the seaman. 1532

Now mind you, that is the high degree of responsibility that goes along with the privilege of being the master of the ship. It is not all privilege, it is not all authority. It carries with it a responsibility, a duty and the obligation to carry out the protection of the ship, and its laden as well, and of course the crew.

Now that is the master's duty and the chief officer's duty and the duty of the engineer, and the duty of every superior of Mr. McAllister aboard the ship, irrespective of whether Mr. McAllister says "I do not feel good," and then the duty is on the ship, not on him. He, as a matter of Congressional statement, as a matter of law, does not have 1533 the mental capacity to take care of himself, and therefore the ship has that responsibility.

Now did they meet that responsibility? No. He says he is sick. He goes up to his bunk, his bed. He goes there from his watches. He doesn't come down for meals. He doesn't associate with his shipmates. Everybody aboard the ship knows that there is something wrong with Mr. McAllister. And in spite of the legal as well as the moral duty to look after the seaman, the master doesn't as much as go down to see what is wrong with him. And there is worse than that. He says that he will provide a doctor and he puts off the purser—I mean put him off from time to

1534 *Plaintiff's Summation.*

time—puts off the first mate—and I don't know what he did as to the engineer. He is not here to tell us. Well, in any event, the master doesn't go up or down, as the case may be, to see Mr. McAllister, but he certainly knows he is ill. He does nothing for him and he does not call the doctor. Now mind you, the obligation to call a doctor is imperative; it is not delegable. The master cannot put it off to somebody else. He cannot put it off to the U. S. Government or the Chinese Government or anybody else.

It is his duty, regardless if he has to turn his ship around and go 600 miles out of his way, more or less. It
1535 is his duty to take care of the seaman when a seaman is put in his charge. His life, the seaman's life, the seaman's health, and his entire existence, is in the hands of the master. The master has no right to crush it or throw it away or disregard it. That is his responsibility. He has authority over that man's life and well being. He has the responsibility as well, and he cannot disregard it, and the law won't let him. At least the American laws won't let him. And this was an American flagship, flying the American flag.

Now this master, who isn't here to meet these charges—and they have known it for two years, that these charges
1536 were being leveled against him, and his deposition could have been reasonably taken to meet any of these charges. This master acted in a very reprehensible manner.

But let us assume another feature. Hardship? What hardship? A ship lying down the pier. Another one in the stream. An Army base across the river, a few minutes away. What hardship was there to get this man off the ship or to call a doctor? Can any of you imagine the master of a ship sending somebody over to the ship that is lying alongside, sending a wire through, or telephoning or communicating by signal to a Navy or Army ship and saying, "We have a sick man aboard the ship. Send a doctor over." Why, what doctor who has the respect for

himself, of calling himself a human being, would refuse to go a few feet or a few yards from one ship to another to see what was wrong with the man? Mind you, let me give you another thought: the master is trained in first aid. So is the first mate; so is the purser. Now the purser has got his hands full with sick people all around him, a dozen of them. What the diseases are is of no importance, but his time is taken up. He is a young man with some training in medicine for a few months, the elementary features of medicine. But his hands are filled with the work of taking care of all of these people. Why didn't the master 1538
put him in? Was it awful to even see a man who is working for him, a member of the crew? Why didn't he go down at least to look at the man and say, "Mac, can I do something for you? Are you being fed? Are you getting enough food?" If Mr. McAllister couldn't take any food, why didn't the master at least go to the steward's department, "Send him up some juices."

Fortunately, the chief steward came up once with tomato juice and left a can with him, a can of tomato juice, which maybe he drank during the five or six days that he was laying there. There was no food he could take, and by the time Mr. McAllister left the ship he had to be given 1539
intravenous glucose—

Mr. Gray: That is objected to. The evidence does not show that he got intravenous glucose injection. I do not know what it is.

Mr. Rassner: All right, maybe it wasn't glucose. I assume it was some sugar—I am wrong.

Coming back to it, Mr. Gray is absolutely right. I don't remember that the said it was glucose. He got intravenous feeding—

Mr. Gray: I object to that. There is no such evidence.

The Court: I will let it stand.

Mr. Rassner: Well, on that there is evidence. However, the jury—

The Court: The jury will have to abide by their recollection. I don't remember anything about it.

Mr. Rassner: In any event, my recollection is—and of course your recollection controls—that when he was taken off at Tsing tao he got intravenous treating, not by way of mouth but through a needle in his person.

Now the condition of Mr. McAllister when he left the ship was such that he had difficulty in walking off the ship. First class treatment? First class service? I doubt it. The least they could have done was order a stretcher put aboard the ship and carried him down. Dr. Stimson says that exertion, making a man walk after the virus strikes his person, is a competent producing cause of aggravating the effects of the virus. But suppose that does aggravate the effects of the virus. How about failing to treat him properly, failing to treat him, failing to relieve him from pain and suffering? To see that his resistance is maintained. Dr. Stimson—and I am not talking of the plaintiff's doctor, the plaintiff's expert. Here is a man who is hardly able to move out of his bed and he is made to walk up, walk up and down a flight of stairs, walk across a gangplank, walk over to the makeshift ambulance—I think they call it an Army truck that they had, or a half-truck that they used as an ambulance—and then walk out of there into the hospital. That is all exertion. That does not stop the virus. That does not build up resistance, the innate resistance of the human body.

So much for the failure to treat. By having dwelled so long on this part of the case I do not want to overlook another item. With poliomyelitis prevalent in Shanghai—

Mr. Gray: That is objected to. There is no such evidence.

The Court: I do not think there is.

Mr. Rassner: I think that the witness—well, let us put it this way, that the master, having told the seamen that there was poliomyelitis prevalent in town. If it wasn't

there, there was a United States Naval ship, a United States Army ship, and a United States Base right at Shanghai. Records as to whether or not there was a polio epidemic are very simple for the defendant to get. We tried to get it through the Chinese Consul. We cabled for it but we couldn't get it. 1543

Mr. Gray: That is objected to. There is no obligation on us to prove the negative.

The Court: That was Mr. Rassner's statement.

Mr. Rassner: I claim they—if the truth were that there was no polio in Shanghai, that there wasn't an epidemic there, they could have had the master of the Navy ship, the master of the Army ship—any number of doctors that were on the Army ship, and perhaps some of them were back in New York—any number of doctors on the Navy ship, any number of doctors at the base—why, they could have had this courtroom flooded with testimony that there was no polio in Shanghai. 1544

I think that we have sustained our burden of proof on the question of whether or not polio was prevalent—at least we showed that the master feared it.

Now, with that knowledge in the possession of the master of the ship, the guardian of this man, the guardian of his entire crew, he does not take any precautions at all. Now, perhaps the work had to go on and perhaps the need of making money for his employer was very important— 1545

Mr. Gray: That is objected to. There is no evidence here that we made a cent out of it.

Mr. Rassner: I suppose—well, I will assume they lost money. They ran a ship over there for the purpose of losing money!

In any event, the master saw fit to totally disregard the safety of the ship. I do not say that if he had kept the others off, that this man wouldn't have come down with polio anyway, but he was entitled to that protection of at least limiting the ship to people whose business called

them aboard the vessel, and that was not given, that protection was not given to Mr. McAllister.

I will not burden you with a few of the other details. We have had that given to you from the witness stand.

There were no sanitary precautions taken, and Dr. Stimson says that the less number of human contacts the less the danger of infection, so at least they exposed him to a competent producing cause of infection, and we have sustained our burden of proof on that.

There is no denial—

Mr. Gray: That is objected to. There is no evidence that any man aboard that ship had polio.

Mr. Rassner: We have shown you that this vessel was in an area where the master of the vessel said polio was prevalent. We have shown you that people from that area came aboard the ship, including peddlers, coolies, truckmen, passengers, and other people. Nobody was stopped, and we have shown you by the testimony—we will take Dr. Stimson's own admission—that humans are carriers, and that the more people that come from an infected area in contact with other people, the greater the danger of infection.

Now I won't burden you with that. I believe that we have sustained our burden of proof on exposure to contagion, and on failure to treat.

There has been no evidence to meet it, none at all, although the defendant was in a position to produce official records to show that there was no polio there, if the statements weren't true, and to show that there was prompt attention given, if what all that these witnesses said was not true.

We have sustained our burden of proof, and Mr. McAllister is entitled to a verdict in his favor on the first cause of action.

We come now down to the second—

Mr. Gray: I object to that. That is for the Court to say— 1549

Mr. Rassner: Is it?

Mr. Gray: —and to instruct the jury.

Mr. Rassner: I think my comment is absolutely proper, and I ask your Honor to so instruct the jury. Now either Mr. Gray's objection is in place or he has gotten up and made an objection which is entirely uncalled for, and I ask your Honor to rule on it one way or the other.

The Court: I do not know what it is you want me to rule on.

Mr. Rassner: Either that I am wrong, or that Mr. Gray— 1550

The Court: I did not hear what you said. I will permit you to go ahead and sum up the case in your own way.

Mr. Rassner: I won't press it.

We are entitled to a verdict in favor of Mr. McAllister—and when I say "we", it is general. Mr. McAllister is entitled to go home to his wife and family and say that "at least our financial troubles are over. We do not have to worry as to how we are going to meet the next day's living expenses, and we do not have to worry about my going out and getting some good doctors to give me surgery for conditions which the steamship company caused." 1551

Mr. Gray: I object to that, your Honor. That is wholly improper and I move for a mistrial.

The Court: Denied.

Mr. Rassner: My comment is that it is Mr. McAllister who is asking you for money, not I. If I lose this case, so far as I am concerned, perhaps I won't be inclined to take a cocktail tonight. As a matter of fact it may make me feel so badly I may miss my dinner tonight, and I may feel kind of sick tomorrow morning, and maybe for a few days, that an American jury should be so misled as

to defeat a man with a claim like Mr. McAllister has; but with Mr. M Allister it will remain the rest of his life. It is he who is here asking you for a verdict in his favor, that he may have the means wherewith to pay for food for himself and his children and his wife, and to pay for his living expenses, and to pay for doctors' bills. That is what he is here for. Perhaps his modesty might have kept the amount down to a few hundred dollars. I have no such false modesty. I know what this type of injury is worth. It is worth $250,000, the amount we have sued for.

Now it is up to you to decide as to the amount. My opinion is going to remain the same, whether you give his a lesser amount or the full amount. My opinion will still be the same. That condition warrants a verdict of $250,000 on the first cause of action.

Now I may be wrong, but I am entitled to my own opinion. You ladies and gentlemen are entitled to your opinion but it is your opinion that is going to govern.

Now I was wondering whether in view of the unusual strain that has been placed upon your patience whether I ought to go on and read just a few paragraphs of the testimony. I rather would like to do that but I am afraid of boring you.

There are just a few items. I will try to keep it within the next five or ten minutes at the most. It is going to be reading matter but I think it will give you a pretty good recapitulation of the testimony. You have been away over the weekend and perhaps some of you ladies and gentlemen have forgotten it. I do not think you did but in order to eliminate that danger let me refresh your mind if I may, and I promise you not to take more than ten minutes on that.

I first want to go very briefly to some of these perodicals. Here is one that was put out by the National Foundation for Infantile Paralysis which was read to Dr. Stimson, and he agreed with this:

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"The first major epidemic of polio, as infantile paralysis, or poliomyelitis, is called, occurred in 1916"—that is 32 years ago—"when 27,363 cases were reported. In the past thirty years"—about a quarter of a million cases have been reported.

Now you see that disease is not unknown. It has been known very, very sadly, but very well for the last fifty years, and particularly in the last thirty years when records have been kept all over the world, so it is not an uncommon disease.

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So whether it is the orthodox system or the Kenny system, it is a disease that the medical profession is only too well acquainted with and it requires immediate treatment.

When I say "immediate treatment," I am not making an idle charge. I will read from Dr. Stimson's pamphlet, which comment is in evidence:

"Many of the diagnoses are easily made by any doctor. A schedule of rest and relaxing and proper nursing care and all measures to combat increased muscle tension can be quickly and adequately instituted by any doctor at all familiar with the infection."

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You see, it is not the type of a disease that Mr. Gray would have you believe is one—well, what can we do, we cannot do anything about it, so what can we do? Well, all they had to do was to get to a doctor, and that is all we have charged them with. They did not get him to a doctor. I don't care what the disease was. It involved the central nervous system, didn't it? Any doctor knew that—any doctor who holds a license, and his place was in a hospital, not in a ship's bunk.

Now Dr. Bennett, the doctor in charge of the Warm

Spring, Georgia, Foundation, had this to say—and it is agreed to be correct:

> "Therefore, it is of utmost importance not only to preserve normal bodily mechanics and alignment by the early restoration of mobility in muscle and joint as mentioned, but also to prevent persistent faulty posture by the most effective methods possible * * * under intelligent supervision, an orthopedic bed, a footboard, and properly placed pillows are all the actual equipment needed to prevent deformities."

Now he talks about preventing deformities. So deformities can be prevented, according to Dr. Bennett, the head of the Georgia Foundation.

What is this talk by Dr. Chaney? Dr. Chaney!

Now I have another article that was put out—

Mr. Gray: If the Court please, I think in order to avoid any misconception, these articles were read into the record and Mr. Rassner has the record, and I do not like to have him reading from something that isn't in the record because I have to check up on it. I think he should read right from the transcript. These are not marked in evidence.

Mr. Rassner: I do not propose this comment as being something that I am reading from the evidence. It is my recollection of the testimony. I am using these articles to refresh my own recollection.

The Court: I think you had better confine yourself to the record. I do not know whether those particular passages which you have read are in the record or not. I will leave that to you.

Mr. Rassner: All right, I will make certain that my summation is strictly in accordance with the law.

It is my recollection that Dr. Stimson admitted, and I

questioned him from an article contained in the National Foundation for Infantile Paralysis, Incorporated, that he admitted that the following is correct:

> "During an epidemic many carriers and persons with the mild undiagnosible forms of poliomyelitis infection unintentionally and unknowingly spread the virus.
>
> "There is no practical way to detect these carriers. All that can be done is to prevent unnecessary contact with others. * * *
>
> "Since this disease comes from other infected 1562
> persons, the less the number of contacts the less the chance of being infected."

I think he agreed that that is true. However, your recollection will govern and not mine.

I believe that Dr. Stimson said he agreed with this, that:

> "In spite of the fact that there is no specific form of treatment, much can be done and should be done by the physician for the patient with infantile paralysis. On the appearance of the very first sus- 1563
> picious symptoms of the disease a physician should be called. * * * The physician can do much to prevent serious complications of poliomyelitis and reduce the crippling that is a common result."

Now, I am not trying to tell you that is exactly what he testified to. That is the substance of what he agreed to.

Now, I believe he agreed that this is a fair description of the Kenny method of treatment:

> "The use of splints, frames and plaster casts in the routine care of the early case of infantile paralysis has been largely replaced by a method of treat-

ment popularized by Miss Elizabeth Kenny, a nurse from Australia. Miss Kenny has pointed out that the pain and some of the loss of muscle power in the early stages of the disease are related to spasm and the marked increased irresistability of muscles. Without attempting to describe this form of treatment it can be said that it appears to have many advantages over rigid and prolonged immobilization which was widely used previously in the care of the infantile paralysis patient.

565 "The Kenny method of treatment, to be of the greatest benefit, should be applied from the very first days of the illness."

I won't burden you with much more—

Mr. Gray: I fail to find any testimony to that effect. and I move for a mistrial.

The Court: Denied.

Mr. Rassner: That is my recollection of what the doctors called on behalf of the defendant admitted, in substance, to be the Kenny treatment.

I believe that the doctors for the defendant admitted that this is so:

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"The whole course of acute infection, rest in bed, physical therapy and surgery, may cover many months. Improvement may continue to take place even for years. Experience has taught that maximum improvement occurs when expert care is administered from the very beginning. Not for one moment does the parent or the patient dare relax in this supervision and care."

Now—oh, I won't bother reading any more of this. Mr. Gray would like to have a mistrial so you do not have to pass upon this question. Why? Why? What is wrong

with your judgment? Why not have you decide this case? Why try it over? What is he afraid of? A decision of twelve Americans? I won't bother reading any more of this.

You have here a defense—and I will try and simplify the nature of their defense—that because the anterior horn cell, that is the little strains that come off the spinal cord itself, right into the vertebral part of the back, that when those cells are destroyed there is paralysis in the extreme parts of the body and in other parts of the body. But there is nothing that human science knows that can prevent 1568
this virus from destroying the cell, the so-called anterior horn cell, and that therefore whether or not any treatment was given to this man, the end result would have been the same.

That is their defense. That is what Dr. Chaney said. And there is a conflict between what he said and what Sister Kenny said, and Dr. Stimson agrees with Sister Kenny. Dr. Chaney does not accept Dr. Stimson as an authority, so you have a conflict between Dr. Chaney and Dr. Stimson, a man called by the defendant. You have that conflict. And you have a conflict between Dr. Chaney and Dr. Frant. And since when is it a crime to be young? So Dr. DiFiore is 30 years of age. So that today is a 1569
crime? The United States Government thought enough of him to put him in charge of the polio ward.

You ladies and gentlemen have had an opportunity of observing his answers to Mr. Gray. I got the impression he rather knew his subject. At least out of the cases that he treated no one came out a paralytic.

Mr. Gray: That is objected to. There is no such evidence.

Mr. Rassner: That is my recollection. That is my recollection, that out of the cases that he treated, I think he had some seventy-odd beds in his ward, and he said he got good results in all of them.

1570 Sister Kenny—don't you think it is difficult to diagnose a case of polio? In four thousand cases she hasn't been wrong once. But can it be so terribly bad if a nurse, who is not a doctor, can do it, why the doctors certainly ought to be able to do it.

But whether you diagnose it as polio or something else, all the doctors admit that evidence clearly shows an involvement of the central nervous system, the brain and the spinal cord, and that immediately called for a doctor's supervision, care and treatment. And that was not given
1571 to Mr. McAllister.

Now I do not need a doctor to tell you or me that when a person is sick he should be fed properly to keep up his resistance. I do not need a doctor to tell you or me that when a person is in pain or in torture, particularly torture such as the entire body is on fire, as if it has been burnt—you know what torture is when you burn a finger. Imagine what torture there is when the entire body feels that way that you cannot even touch a person. He cannot even stand a sheet against his body. You have to be careful how you move him.

Imagine a person in that torture, and you just let him
1572 lie there, let alone not give him any morphine or sedatives, no hot packs—nothing at all.

They certainly could have made him comfortable if nothing else. And by making him comfortable you do not call upon the reserve of your innate physical strength to combat the virus.

What else does the human body have except its own innate human strength, of its own blood and tissues, to combat the inroads of the virus.

Now if you are destroying the very factors, or lessening the very factors which have to combat the inroads of the virus, by not feeding the patient, by having the patient in torture—and Dr. Stimson said that they let these patients sleep even during medical treatment time rather than dis-

turb them, as sleep is one of the therapeutic methods to combat the virus. If a man cannot sleep because he is in pain and all the virus symptoms—I won't consume time going through it—and all these various conditions that tend to aggravate the effect of the virus, is imposed on Mr. McAllister, in violation of law and in violation of good common ordinary civilized action, and then this defendant has the temerity to come here and say, "We do not want to pay you anything."

Now mind you, Mr. McAllister is entirely at your mercy. He cannot get any War Risk Insurance. There was talk 1574
here about there being a state of war. Why didn't they give him his war risk insurance? It doesn't say a state of war in the United States. The contract is in evidence, a state of war. Any state of war, any place in the world is the way I read it, and if Mr. McAllister is taken sick during his service under war conditions, he would be entitled to a pension, and he was denied his pension because there was no war, and he was not in a war area. He was denied his pension.

This is the only place he can go to. He cannot get compensation the way he would have gotten if he were injured in a boiler factory or a shipyard. There is no compensation for seamen. He cannot get it. He gets it here or 1575
he gets it no place.

He walks out with a dollar from this court, or he doesn't walk out with a dollar from any other place, and there is no place he can go to. He cannot go to a commissioner, a compensation commissioner.

He cannot go to the United States Government and ask for a pension.

He was not injured in a war area, therefore his claim for war risk benefits have been refused, and he is here today.

So let us not make a mistake and say, "Well, if he doesn't collect here, maybe some other good Government

1576 branch will give him some money." No; here or no place!

Now let us go into the extent of the damages if I may for a few moments. You see, I am laboring against the mental thought that I am boring you because of the length of time I am consuming, and yet I do not want to risk the danger of falling short and doing injustice to my client.

I hope you will be patient with me and not with me so much as with my purpose.

Mr. McAllister is suing for $250,000 because he lost the use of his legs, and because he lost the use of his left arm,
1577 and those leg muscles, the back muscles, the other muscles which have been described by Dr. DiFiore are useless today. He has to lock and unlock his legs, the braces on his legs, to sit down. The muscles are atrophied. They are gone. They are useless. For all practical purposes he might be better off with artificial legs and he wouldn't have the trouble and he wouldn't have crutches to use to get about. With a pair of artificial legs he might be better off from an economic point of view.

Now we are here on an economic question, a plain unadulterated problem. He is here to get money from the steamship company. How much? Well, he economically is
1578 worse off than if he had a pair of artificial legs, because he cannot do the work that a man with artificial legs could do.

His earning capacity has been approximately three to four thousand dollars a year. Now we will take $3,000 as a yearly basis. He is not even thirty years of age yet. He has got at least thirty years of working capacity. 30 times 3 is $90,000 that he has lost by loss of earnings alone—$90,000.

I mean the amount seems high but if you want to be fair with the man—and I am sure you do—there is one item—and let us be mathematical there—there is $90,000 there alone. Now if you take $3,500 as the basis, and if you use your own common sense and say, "Well, he is a second

aassistant engineer today. Perhaps if he weren't disabled he would be a first, and perhaps a chief engineer, and his earning capacity would perhaps then be double the amount."

Well, be that as it may, there is $90,000 that we start with. There is the question of two legs being disabled and a question of an arm being disabled, besides the back muscles.

Now, how about the pain and suffering? The man has the feeling of having his entire body seared by flames, and he is left in a tortured condition for at least a week—per- 1580
haps longer. How about the fact that he wasn't given first-class transportation?

Instead of this defendant undertaking to give him first-class transportation back to a place where he could get the best medical attention, they passed him over to United States Government authorities, the same as we would pick up a drunk on the Bowery and ship him into Bellevue, and our responsibility is over.

Well, you cannot do that, under their contract that they themselves offered in evidence—first-class treatment and transportation back to the United States.

When a man is suffering with polio, 1st-class treatment 1581
is a private plane back to the United States immediately—not by cattleboat or banana boat, or whatever they gave him—eighteen days at sea, without even a nurse or doctor.

Now I don't have to tell you that that is not first-class treatment. I won't insult your intelligence. That certainly is not first-class treatment.

How about the damages for that pain and suffering? How about the fact that he did not have a doctor all that time?

The Government was pressed, with our boys coming back, with other troubles, privations and difficulty. There were plenty of private planes that anybody that wanted to pay for it could have had, but he was just a seaman. Per-

haps he would die on the way back and that would be the end of it, and all the trouble would be over.

He had a bulbar involvement. The chances of death were good, and they passed him over to the American authorities who were overburdened with a lot of casualties. They could not give each and every soldier first-class transportation back—

Mr. Gray: I object. There is no evidence that they did not have ample facilities to take care of this man and give it to him.

1583 Mr. Rassner: Well, you know what facilities he got. He got a boat to come back on—not a plane. He was put into a base hospital where they did not know or did not have the facilities of treating him adequately and properly, a man that was entitled as a matter of contract to the best of treatment.

Well, my boy and yours went overseas to battle, to take their chances out on a field. That is different. That was part of their job. It was a tough one but it was part of their job. But not the seaman. The war was over. He was entitled to private care, the best of care, and he did not get it, and he is entitled to be paid for that. He is entitled to be paid for that.

1584 Two hundred and fifty thousand dollars is my estimate. I don't think I am wrong. However, that we leave entirely with your own good common sense and your own sense of fairness and decency.

I did not hesitate in selecting you ladies and gentlemen as members of the jury. The fact that one of you jurymen happened to be married to a claim agent for the Aetna Insurance Company did not faze me. All I know is that I am getting Americans here, Americans, and I assume, and I think rightfully so, and I have never been wrong yet—justice at the hands of an American jury.

I told Mr. McAllister, "Let the jury decide this question. Let the jury do it. You put your faith in the American

jury, not in me—not in me at all. Not in the doctors that you may call but in the American jury. They won't let you down.

"You have been crippled and disabled through no fault of your own."

The defendant hasn't even claimed it was his fault in any way. It was a fault, a grievous fault which Sister Kenny says could have prevented, if properly treated—would have prevented any deformity. And Dr. Chaney admits that there is deformity here.

Dr. Stimson says that deformity can be prevented by early treatment, that all danger of deformity is preventable. 1586
Their own doctor says that.

Now you have here a situation where a man has been crippled for life unnecessarily—unnecessarily—and in violation of good conduct, and in violation of law.

Therefore I say to you good people, you Americans, you fellow Americans, remember Mr. McAllister is here asking you to do justice for him. I am merely talking for him because I have had the facilities of getting an education so that I can do so, and the privilege of being before you.

He cannot talk for himself, so he has asked me to do it for him. That is about all I have to do in the matter, but this is in your hands, to see that justice is done. 1587

His entire life, in his relationship with his wife and his children, his life in general, the question of getting charity handed out to him in the way of treatment, or getting him the best of care, depends on how much money he has in his pocket. That is important. The amount is very important to him, to his future welfare.

So much for the first cause of action.

On the second cause of action I call your attention to the testimony on the amount of future disability. Now I would like you to bear with me—and I am only going to take about a minute on it but I would like you to give me

1588 your close attention as you have done right through the whole trial of the case.

We are dealing with a question of evidence, not a question of sentiment. You cannot forget certain feelings; that is true, but in a large measure, in the over-all picture, not as the doctors have been taking it. Well, it destroys a cell, therefore the damage is done. What about protecting the other cells? What about the other conditions?

Well, we are talking about destroying the cells; but we take not one part but we take the over-all picture. The 1589 testimony here is that Mr. McAllister will require from ten to fifteen years of further surgical treatment; that that will cost between $2,500 and $3,000 a year, and that ten years is the minimum amount of time to get him the best cure possible, which the law guarantees, irrespective of negligence. $2,500 to $3,000 a year is the basis you can take.

Ten years is the minimum period which has been given to you by the testimony of Dr. Frant, and although I have offered to three doctors to have Mr. McAllister examined by the defendant, and before we came into court so that they could deny it, there is no denial, and I do not believe that you can disregard that. It may sound high, it may sound exaggerated, but it is in the testimony, and it is not 1590 contradicted, and as a matter of fairness he is entitled to at least ten years of maintenance at the rate of $2,500 a year to $3,000 a year.

You have that problem before you. There is no testimony to the contrary and that he is entitled to.

Now ladies and gentlemen, I want to close with one word of thanks from me for your kindness and your patience in listening to a rather technical case, but there is one thought I do want to say, and that is, whatever you do, let it be on the basis of American citizens, fully aware of justice, fairness and honesty.

The Court: I do not know what the jury wants to do now. It is now a quarter past one. Shall we go through and

finish up the case now or shall we finish up the case after you have had lunch?. Perhaps we will take a recess for a few minutes anyway, and then you can let me know what you want to do. It is probable if we went ahead now we wouldn't get out much before two; but I don't know.

(Short recess.)

PLAINTIFF'S REQUESTS TO CHARGE.

Plaintiff respectfully asks the Court to charge as follows on the authorities of the respective cases, which will be hereafter cited, including the excerpt upon which the 1592
request is based:

1. An officer may not rely on his own unskilled judgment to the detriment of a seaman employed aboard his vessel.

This request is based on the following excerpt from the case of The Governor, 230 F. 857, wherein the Court stated on page 858:

> "B t I do not believe that, when the real conditions may be so readily ascertained as they could have been * * * in the present case, the officers should rely upon their own unskilled judgment to the detriment of the seaman under their care". 1593

(Refused except as charged.)

2. That due care requires that the judgment of the officers when dealing with injured seamen should be exercised, not only with such knowledge as they possess, but also with such as they can readily acquire.

The above request is a literal excerpt in the case of The Governor, supra, on page 859.

(Refuse to amplify charge in this respect.)

3. A master is duty bound to make a careful examination as to the nature of an illness, irrespective of the seaman's complaint, so long as the master is put on notice.

This request is based on the authority in the case of The Iroquois, 194 U. S. 240, where the Court found for a seaman on the negligence of a master to examine closely and failing to provide hospitalization by not going 600 miles out of course (p. 246).

> "It is true the libellant said the bones were not united, but he does not seem to have complained of this to the master; yet with a careful examination, such as the master was bound to make, we think he should have detected it. It may be, however, that the bones failed to unite by reason of the libellant being allowed to go upon deck * * *".

(Refuse to amplify charge in this respect.)

4. The master is under the duty to look after the safety and care of a seaman whether he asks for treatment or not.

This request is based on the authority in the case of The Iroquois, supra, where the Court stated on page 247:

> "The master was his legal guardian in the sense that it is a part of his duty to look out for the safety and care of his seamen, whether they make a distinct request for it or not."

(Allowed as indicated.)

5. The defendant is liable for all of the consequences of the disease which could have been prevented by giving prompt, adequate and proper hospitalization in the United States or in a hospital equipped to give proper and adequate treatment.

This request is based on the authority in the case of The Svaeland, 132 F. 932, where the Court stated on page 936:

> "* * * certainly the consequences of such lack of information on their part ought not to be visited upon the

libellant, and he (sic) denied a reasonable recovery for the suffering and additional injury he sustained as a consequence. He had no voice in the selection of doctors; was himself subject to the orders of the ship's master; and was confined on shipboard in a crippled condition, where he could secure no relief save through the ship's master; and he was not responsible in any sense for what was done * * * To deny the right of recovery to the libellant would be to enable the ship's master, with a seaman having a broken ankle, to speculate on the chances of a 1598
sprained ankle, and visit the consequences of his miscalculation, in addition to the suffering and affliction that ensued, upon the innocent seaman".

(Denied except as charged.)

6. The fact that the officers believed that the plaintiff was shamming does not excuse the defendant for failing to have him immediately examined by a physician and given prompt, adequate and proper treatment.

This request is based on the authority in the case of Morris v. United States, 3 Fed. (2d) 588, wherein the Court stated on page 591: 1599

"Even though the captain was mistaken, and committed an error of judgment in believing that the appellant was shamming, this fact does not relieve the ship from the responsibility it owed the seaman * * * The consequential damage due to the failure to afford medical aid and maintenance is a measure of damages which is to be awarded."

(Refused except as charged.)

7. It was the duty of the master to look out for the care and health of the plaintiff whether he made a request

of him so to do or not, and in the exercise of that degree of care, consideration and responsibility which the master's position imposed upon him, he was duty bound to see what the character of the illness was from which the plaintiff was suffering, and the master could not hesitate, vacillate, speculate or take chances that the condition might pass without treatment.

This request is based on the authority in the case of The M. E. Luckenback, 174 F. 265, wherein the Court stated on page 267:

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> "It was the duty of the master to look out for the care and health of the libelant, whether he made a request of him so to do or not; and from this testimony it is clear that libelant's condition, lasting during a period of seven days before reaching Colon, was such as to require of the master, in the exercise of that degree of care, consideration and responsibility which his position imposed upon him, to see what was the character of the fever from which libelant was suffering, and was something as to which he could not hesitate, vacillate, speculate or take chances upon * * *".

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(Refused.)

8. That it does not make any difference whether the illness was aggravated by omission or commission, as either fault would impose legal liability.

This request is based on the authority in the case of Cortez v. Baltimore Insular Line, 287 U. S. 367, wherein the Court stated on page 374:

> "Nor is liability escaped by appeal to the distinction between acts of omission on the one hand and those of commission on the other. Moch Co. v.

Rensselaer Water Co., 274 N. Y. 160, 167, 168; 159 N. E. 896".

(Refused except as charged.)

9. That in the event of a member of the crew being rendered ill, injured or otherwise disabled in the course of his employment aboard the vessel, an entry must be made in the ship's log setting forth the nature of such illness, injury or disability and the details as to its occurrence.

(Refused.)

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10. The failure to make an appropriate entry in the ship's log, where it is reasonable to foresee that the ship's liability may later be questioned, creates an inference against the ship's defense in a seaman's suit for injuries (The Alpha, 44 F. Supp. 809).

(Refused.)

11. The plaintiff asks that this Court take judicial notice of Section 201 of the United States Code, Title 46, which provides as follows:

"Every vessel making voyages from a port in the United States to any foreign port, — shall have an official log book; and every master of such vessel shall make, or cause to be made therein, entries of the following matters, that is to say:

Fifth. Every case of illness or injury happening to any member of the crew, with the nature thereof, and the medical treatment."

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(Refused.)

12. That the unexplained failure to call a witness under the control of the defendant permits the jury to draw an

inference that had such witness been called, his testimony would not have been favorable to the defendant.

(Refused. This may be argued to the jury.)

13. That the law applicable to a witness, that upon the jury finding that he has been guilty of testifying falsely as to material facts gives the jury the right to disregard such witness' entire testimony, applies with equal force to the testimony of a doctor as it does to a lay witness.

(Refused except as charged.)

607 14. That the defendant had the legal right to a physical examination of the plaintiff before trial as to the nature and extent of his disability.

(Allowed.)

15. That the defendant had the legal right to examine the plaintiff orally as to each and every claim of negligence upon which he predicated his cause of action.

(Ditto.)

DEFENDANT'S REQUESTS TO CHARGE.

The defendant respectfully requests that the Court 608 charge the jury in this action as follows:

1. The S. S. Edward B. Haines at all the times involved in this action was owned by the United States of America.

(Already charged.)

2. At all the times involved in this action, the defendant, Cosmopolitan Shipping Company, Inc., was subject to none of the obligations of an owner of the S. S. Edward B. Haines.

(Denied except as charged.)

3. The statutes of the United States authorize suits against the United States of America for the type of negligence alleged in the complaint in this action.

(Refused, although the statement of law is correct.)

4. The defendant, Cosmopolitan Shipping Company, Inc., disclosed its agency for the War Shipping Administration in the contract of employment on the vessel entered into by the plaintiff and is not answerable for any of the acts or omissions for which the owner of the vessel may be liable.

(Refused.)

5. The defendant is not responsible for any acts or omissions of any of the officers and crew of the S. S. Edward B. Haines in the management, operation and navigation of the vessel upon the voyage involved in this suit, after she left the Port of New York in July 1945. 1610

(Refused.)

6. With respect to the hiring of the crew of the S. S. Edward B. Haines, the defendant, Cosmopolitan Shipping Company, Inc., merely acted in the capacity of an employment agency.

(Refused.)

7. On the issue of alleged negligent care of the plaintiff, you should find for the defendant, unless you find from a preponderance of the credible evidence that during the period the plaintiff remained continually in his bed immediately prior to December 1, 1945, the ravages of the poliomyelitis in his spinal cord could have been stopped or checked and, if so, that damage resulted as a consequence thereof. 1611

(Refused except as charged.)

8. On the issue of the alleged negligent failure of the defendant to prevent the plaintiff from contracting the disease known as poliomyelitis at the time he did, you should find for the defendant, unless you can determine from

1612 *Charge of the Court.*

a preponderance of the credible evidence from what source and under what circumstances the plaintiff contracted said disease and that the defendant was negligently responsible therefor.

(Ditto.)

9. On the issue of maintenance and cure you should find for the defendant, unless you find from the evidence that the defendant was the owner or the bareboat charterer of the S. S. Edward B. Haines during the voyage involved in this suit.

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(Refused.)

10. If you decide upon a verdict for the plaintiff you are to designate what amount, if any, you award for damage, and what amount, if any, you award for maintenance and cure.

(Allowed.)

CHARGE OF THE COURT.

(COXE, J.):

1614 The Court: Members of the jury, this is a seaman's action brought by Robert A. McAllister, plaintiff, against the Cosmopolitan Shipping Co., Inc., defendant.

During the latter part of 1945 the plaintiff was the second assistant engineer on the S. S. Edward B. Haines, a Liberty ship owned by the United States and operated by the defendant Cosmopolitan Shipping Co., Inc., under a General Agency agreement. The ship, during that period, was on a voyage to Chinese ports and return.

The plaintiff became ill while the vessel was in Chinese waters, from a severe case of poliomyelitis, and it is for the injuries resulting from that illness that he is now bringing the present action.

The complaint contains two separate counts, or, as counsel has said, causes of action: one for damages for injuries alleged to have been sustained by the plaintiff as a result of the negligence of the defendant, first, in allowing the plaintiff to become exposed to infection from poliomyelitis while in Chinese waters; and, second, for failure to provide the plaintiff with prompt and adequate treatment after he became ill. The other count is for what we call maintenance and cure under the General Maritime Law.

The first count is framed under a Federal statute, which 1616
is known generally as the Jones Act, which gives to an injured seaman a right of action against his employer for damages for injuries resulting in whole or in part from the negligence of any of the officers, agents or other employees of the employer. The whole basis of the claim under this Act is negligence, and negligence, speaking generally, is the failure to exercise that degree of reasonable care which a reasonable person would exercise in similar or like circumstances.

The second count, as I have already stated, is framed under the General Maritime Law, which gives to a seaman who has been injured in the service of his ship or has become ill in the service of his ship, his reasonable maintenance and cure for a reasonable period of time. Maintenance is nothing more than board and lodging, that is, the board and lodging that he would receive himself on board the ship. Cure means medical and hospital service and attention. 1617

Maintenance and cure cannot last for an indefinite period of time but only for a reasonable time. It ordinarily ends when the cure has reached its maximum development. In other words, a man who loses his leg, generally speaking, is entitled to cure up to the time that he has been treated so that the cure has reached its maximum point of development. Speaking generally, too, and ordinarily, cure, in

cases of this kind, or recovery for cure in cases of this kind, cannot be obtained, because the United States had provided in different parts of the country, marine hospitals which are always available for seamen to go to to receive medical and hospital care, without any cost whatever to the seamen; so that, generally speaking, a seaman who does need medical care or cure, should go to the marine hospitals where this service is given to him gratis. There are, of course, exceptions to that rule, where the marine hospitals do not provide adequate medical service and cure, and in such cases it
1619 may be well that the seaman should be permitted to go to other hospitals or to other experts in order to obtain the cure which the law permits him to obtain; but I doubt from the testimony I have heard in this case whether this is a case for special treatment, and without arguing it or stating the facts at this time, I will defer that until later.

The issue with respect to the first question, on the subject of liability, is whether the plaintiff's injuries resulted in whole or in part from the negligence of the defendant, either in exposing or allowing the plaintiff to be exposed to poliomyelitis, or in failing to give the plaintiff prompt and adequate medical care and attention.

The question with respect to the second count for
1620 maintenance and cure is largely, what is the proper period of time for such maintenance and cure under the circumstances of the present case?

The evidence has taken a very wide range and I am not going to attempt to review it in any great detail. I should like, however, to briefly run over some of the testimony in perhaps a chronological way so as to recapitulate the various parts of the evidence which has been adduced now during an entire week.

The plaintiff is now twenty-seven years of age. You have heard his testimony, how he happened to sign the shipping articles for employment on the S. S. Edward B. Haines.

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The ship left New York on July 31, 1945, and after proceeding through the Suez Canal, it touched at Singapore on September 13th and 14th; from there it proceeded to Hong Kong, which was reached on September 19th, and the vessel remained there for a period of four days or until September 23rd. From Hong Kong the vessel proceeded to Shanghai, which was reached on September 26th. The vessel remained there for a period of just about five weeks, or until November 1, 1945.

Most of the testimony in the case with respect to what happened to the plaintiff seems to cover that period of five weeks.

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The vessel left Shanghai, as I have already stated, on November 1, and it then proceeded back to Hong Kong, where it arrived on November 5, and remained at Hong Kong for a period of two days until November 7.

It then again retraced its steps and went back to Shanghai, where it arrived on November 11, and remained there until November 23, sailing on November 23 for Tsingtao, which was reached on November 25.

That, in general, is the chronology of the movements of the ship. I think it is of some importance, because of the fact that it is so difficult for anyone to tell where or how the plaintiff could have contracted or did contract poliomyelitis, which really is the subject of the present action.

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The witnesses for the plaintiff testified that after the ship arrived at Shanghai on September 26th, that is, the first time the ship arrived at Shanghai, the master, Captain Leavitt, assembled the officers and discussed with them this question of diseases on shore, and some of the witnesses as I recall the testimony stated that the master referred to the fact that there were epidemics or that there were diseases on shore, and cautioned the officers against exposure to infection from any of them.

The master also, according to the testimony, directed the officers to post notices on the ship, calling attention of

the crew to these different diseases which, as I remember, were listed as influenza, dysentery, cholera, poliomyelitis and some others. They were all grouped together generally as being diseases which the officers and the members of the crew should be careful to avoid or become exposed to while they were on shore leave.

There was also testimony that during the period that the vessel was at Shanghai, a large number of coolie stevedores came on board the ship, that there were peddlers who also came on board the ship and peddled their wares among the members of the crew, and further, that there were truck
1625 drivers and Chinese persons who have been referred to as passengers; and that all of these persons in general had the run of the ship and used the toilet and other facilities.

There was also testimony to the effect that during this period there was a temporary shack in which there were toilet facilities, and that the water used in this shack came from the regular water supply in the engine room, and then that the excreta, or whatever it was, was led into the sea through a fire hose.

There was also testimony about a drinking fount which seems to have been used by persons who were on the ship, including these persons who had come from ashore.

1626 The plaintiff said in his testimony that during the period from September 26th to November 1st, when the vessel was at Shanghai, he went ashore frequently, or, as he said, whenever he had a chance. He also testified I think on cross-examination that the last time he went ashore was two and a half to three weeks prior to December 1st, which would have made the date about November 8th. In other words, according to his testimony, he had been ashore frequently during the entire period that the ship was at Shanghai on the first trip between September 26th and November 1st.

He also said that he first started to feel sick on November 11th, which would have been about the time or on the day when the ship arrived back in Shanghai on the second trip.

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He testified that this sickness at first consisted of nausea, a sort of a burning sensation, and that soon afterwards he felt a stiff neck and he had trouble in eating, and also had trouble in swallowing.

He further said that it was about November 21st when he went to his bunk and stayed there, and that he remained in his bunk continuously after that until December 1st, when he was removed from the vessel at Tsingtao and taken to the marine hospital there.

Now I am not going to attempt to go over all of the symptoms which have been testified to by the plaintiff, and also by the others who have testified on behalf of the plaintiff. I think you will remember most of them.

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The witnesses testifying for the plaintiff, who described at various times his condition during this period up to the time when the vessel arrived at Tsingtao, were Limartz, the first mate, Napier, the purser; Bentz, the deck engineer; Brodowski, the watertender; Bullis, the acting first engineer, and McLeod, the oiler.

Those witnesses at various times saw the plaintiff and described the deterioration, if that is the proper word, in his condition.

Napier, the purser, who was also the pharmacist's mate, testified that on November 24th, which was the day after the vessel left Shanghai for Tsingtao, he made a formal report to the captain of the plaintiff's illness, and his testimony was to the effect that prior to November 24th the master was advised by one or another of the witnesses of his condition.

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There was also testimony that during the time that the vessel was at Shanghai, there were the two hospital ships in the harbor, and as a matter of fact the plaintiff was taken to one of those hospital ships, namely, the Repose, on December 7th, after he had been in the hospital at Tsingtao for a period of about a week.

There was also some reference to the fact that there

were Government agencies in Shanghai which might have been available for supplying medical treatment.

This brings me back to what I have already stated as being the main issue in this case, namely, with respect to the first question, and that issue, as I have already said, is whether the plaintiff's injuries resulted in whole or in part from the negligence of the defendant, or from the negligence of any of the officers, agents or employees of the defendant, which is substantially the language of the statute. That issue is the issue which I will leave entirely to the jury to determine by themselves.

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I have not touched on the medical testimony. It has been most extensive, and I think probably that it has been very informative. Although the different witnesses who testified are not in complete agreement, I think, generally speaking, that there are some conclusions which have been pretty well established in the testimony. I merely am offering this to the jury for their guidance, and if you find that these conclusions are not supported by the testimony you, of course, will abide by your own recollection, and treat them merely as my opinions and disregard them if you want to.

These conclusions I think are as follows:

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(1) Poliomyelitis is a virus disease in which the virus is taken in through the mouth or nose, or, as one of the witnesses said, through the alimentary tract or channel.

(2) The virus attacks the nerve cells of the spinal cord, and these cells in turn affect the muscular system and bring about varying degrees of muscular paralysis.

(3) It is not yet known how the disease is communicated or acquired.

(4) The most likely period of incubation seems to be between ten and fourteen days, but this period may be much less or even longer.

(5) The Kenny method of treatment was a substantial contribution to the treatment of the disease, particularly in teaching that the muscles should be relaxed during the early stages of the disease.

(6) There is no known way to bring back the muscles which have become paralyzed or atrophied.

So that it will be for you to apply the medical testimony and the tests that were found in that testimony to this case. It is not my function, and I shall not attempt to argue the questions with you. I might, however, point out that if the period of incubation were as some of those experts stated, 1634
a period of about fourteen days, and the plaintiff first came down with the disease on November 11th, that would of course take him back to the time or the period, when the vessel was at Shanghai between September 26th and November 1st.

It would also cover the period which has been discussed in the testimony when these coolies, stevedores and others, were on board the ship, but, as I have already stated, and I think it is established by the medical testimony in this case — no one knows at the present time from the knowledge that medical science has been able to develop, how or in what way or by what means the virus or the germ of 1635
this disease is carried; so that to some extent you are asked in this case, based on this evidence, to arrive at a conclusion which is largely a medical conclusion and which apparently still is a baffling one for many of the medical men in this country who know about this disease.

There has been some reference made during the trial to the fact that there was no doctor on board this ship during the voyage, and I state to you that I know of no requirement by statute or otherwise which required this particular vessel at that time to have a licensed physician or doctor on board.

This brings me to the question of damages. In other words, if you find with respect to the first count, based on

negligence, that the defendant is liable to the plaintiff for damages for his injuries, resulting from or caused by negligence of the defendant, then you would come to the question of damages, and the ordinary rule of damages in a case of this kind is that the plaintiff, if he is entitled to recover damages, may recover, first, for his out-of-pocket expenses for medicines and hospital care; second, for any lost wages up to the time of the trial; and third, for past, present and future pain and suffering which he may have; fourth, for such an amount as the jury may decide that he
637 is entitled to for his permanent injuries.

Now with respect to the first item which I have mentioned for out-of-pocket expenses, there is no testimony or no evidence whatever that the plaintiff has been put to any expense at all. It is quite apparent why he has not been put to such expense, because he had been treated entirely in the marine hospitals operated by the United States, so that that item may be eliminated.

With respect to the second item for lost wages, it is the plaintiff's testimony that his salary was $220 a month, and that during this particular voyage he had earned, on an average for overtime, $100 more, making in all the sum of
638 approximately $320 a month.

The plaintiff concedes that he has been fully paid for his wages or his salary up to the end of the voyage, which terminated on July 29, 1946, and that that includes anything for maintenance also.

So that there is the period from July 29, 1946, down to date, namely, February 9, 1948, when, if he is entitled to recover under the first count, he would be entitled to his lost wages, and I figure roughly that period to amount to a little over eighteen months.

Of course you could not be sure if he had come back home that he would have been immediately employed again, or that he would have earned or had been paid that amount of $320 a month, especially as it was at the end of the war

period; but however that may be, I am merely stating those figures to you, together with the dates, from which any computation could be made.

The third item of damages, namely, pain and suffering, is something that nobody can gauge and is entirely for the jury to determine.

The same also is true with respect to the permanent injuries.

It has been conceded by all of the medical men that the plaintiff today has lost the complete use of his lower limbs from the waist down, and also that he has suffered 1640
from paralysis of his left arm, but that his left hand is functioning properly.

That brings me to the second count for maintenance and cure. To a certain extent those same dates are applicable. Plaintiff was paid fully until July 29, 1946.

He left the marine hospital at Staten Island on May 9, 1946, and then, as you will recall, he said that he had had nurse's treatment or out-patient treatment at Bellevue Hospital, which lasted until July 12, 1946, and that subsequently he had some out-patient treatment at the Ruptured and Crippled Hospital, but that he had had no treatment whatever since the end of 1946.

1641

So that I should think that any period beyond which he would not be entitled to maintenance would end at the end of 1946.

With respect to cure which, as I have already stated, means nothing more than medical treatment and hospital care, there is this testimony from Dr. Frant to the effect that the plaintiff reasonably should have about ten years of treatment. From now on he estimated the figure would be something like $2,500 to $3,000 a year.

Dr. DiFiore, who also was called as an expert by the plaintiff, stated, in questions which I put to him myself, that he thought the cure had reached its maximum development at the present time, and I am not sure that he did

not say it was even prior to that, and that there really was nothing more that he felt could be done to help the plaintiff.

There is also this question which I touched on, to the effect that the marine hospital is available for all of the ordinary medical treatment and care which a seaman is entitled to, and although it may well be that there are other experts or other facilities which would be better supplied at Bellevue or at some other place, I doubt whether there is enough in this case to warrant the jury in allowing anything for either maintenance or cure, at least beyond the
1643 end of 1946. Again, I am giving you that merely as my own opinion, and you are in no way bound by it.

This is a civil case, and the plaintiff is required to prove his case by a fair preponderance of the evidence. That burden follows him throughout the entire trial. The rulings made by the Court during the course of the trial are of no concern whatever of the jury, and you should disregard them entirely. That is true particularly with respect to the denial of the motion made by the defendant to dismiss or for a directed verdict for the defendant, which was made entirely on a question of law, and in substance did nothing more than to say that there was or there were questions
1644 of fact which properly should be submitted to the jury.

The jury are the sole judges of the facts, of the credibility of the witnesses and of the inferences to be derived from the facts. If you find that I have misstated or misquoted, inadvertently or otherwise, any of the evidence or any of the testimony, you will disregard what I have stated to you and abide by your own recollection.

The testimony of the expert witnesses is also a question entirely for the jury to determine as to credibility. You do not have to accept those opinions unless you are satisfied from what the particular witness has said that his testimony is entitled to credit. In other words, the credibility of those

witnesses is just as much for the jury to determine as the credibility of any other witness.

If you find that any witness has wilfully given false testimony with respect to any material fact, you may, if you care to do so, disregard the testimony of such witness entirely, but you are not required to do so.

Your verdict in this case may be on the first count, based on negligence, for the plaintiff for such an amount as you may decide he is entitled to, or it may be for the defendant.

Your verdict on the second count for maintenance and cure, may also be for such an amount as you may feel that the plaintiff is entitled to, or it may be for the defendant.

I may say again that these two counts are separate and distinct counts, and should be disposed of separately, but you should be very careful not to have any overlapping insofar as those two counts are concerned, because there may be some places where certain items which I have enumerated already to the jury may overlap some amounts which might be applicable on the second count for maintenance and cure.

I may say in conclusion that I have examined the requests to charge which have been submitted to me by counsel, and I have indicated on the margin my disposition of them, and if counsel care to have me charge the jury on any of the ones that have been allowed, I am quite willing to do so. It is understood as to those that are disallowed that counsel have exceptions to them respectively.

Mr. Rassner: Naturally, I would respectfully ask the Court to charge all the requests to charge which have been allowed. However, before we proceed with that, may I note my exception to certain parts of your Honor's charge?

The Court: Yes.

Mr. Rassner: I take exception to any reference to the fact that the United States Marine Hospital is equipped to render to Mr. McAllister such treatment as would tend

to give him the maximum benefit of medical aid and attendance.

I take exception to such parts of your Honor's charge as would seem to indicate that he receives his treatments only at the U. S. Marine Hospital, and I respectfully call your Honor's attention to the fact that he has been and still is a patient of Bellevue, or that and other private hospitals or city hospitals, which will require Mr. McAllister to pay for every bit of treatment—

The Court: I did not touch that and did not mean to. What I did was to recall his testimony to the effect that he had had no treatment after the end of 1946. Do I understand that that is your recollection of it?

Mr. Rassner: That is not my recollection. My recollection is that he is still under treatment at Bellevue, that he was only there a few days ago, and that he still is being treated.

The Court: Well, that is entirely for the jury to determine.

Mr. Rassner: I take exception to your Honor's statement as to the period of maintenance, or any reference to the fact that it might have terminated heretofore, and to the fact that his treatment is without charge, because he will have to pay, if he gets any money, for all the treatments he got outside of the U. S. marine hospitals.

I also take exception to that part of your Honor's charge which would indicate that he has received the maximum benefit of medical aid, care and attendance, because Dr. DeFiore was specifically asked, with reference to maximum benefit or maximum improvement that he has received, that he excluded surgery, and that he had no reference to surgery, and that it was only Dr. Frant, without any contradiction by anybody else, that there is surgery indicated here, the treatment of which will take from ten to fifteen years, at an expenditure of from $2,500 to $3,000 a year.

The Court: There you are arguing the case all over

again, and probably you are arguing against me. I do not know why you should, but still—

Mr. Rassner: I ask your Honor to so charge the jury.

The Court: As I have told the jury, every one of these experts is before the jury, and the credibility of the experts is entirely in their hands, whether it was disputed by any other witness or not.

Mr. Rassner: Now your Honor made reference to the fact—and I think your Honor perhaps has covered it, but would you mind elaborating that notice to the first mate or to the chief engineer or to any superior of Mr. McAllister, as to the illness of Mr. McAllister, was sufficient notice under the law to the defendant.

The Court: I think it is perfectly clear that the people who testified here, including the first mate, knew of his illness, and it has also been testified—and it isn't contradicted—that the master was told that at some time prior to the 21st that this boy was sick.

Mr. Rassner: That is perfectly satisfactory now.

The Court: Whether he was told that he was very sick or not is a different question. There seems to be a considerably amount of doubt as to that, between some of the witnesses who testified.

Mr. Rassner: That part is certainly satisfactory. May I have the parts which your Honor has allowed.

(The Court hands to Mr. Rassner.)

Mr. Rassner: Thank you.

Mr. Gray: May I ask your Honor to charge, please, that the mere fact that you have discussed the amount of damages, is no indication to the jury that they are to find for the plaintiff?

The Court: Well, of course, that is true, and I was particular to say that it was conditioned on their finding liability first, and as to the rest of it it was entirely in their hands, within those limitations.

Mr. Gray: And may I also respectfully object to your Honor's refusal to charge as indicated on the defendant's requests to charge, which were offered to your Honor for the purpose of maintaining the questions of law in the case.

The Court: I have so stated.

Mr. Rassner: On behalf of the plaintiff I would like to note an exception to such parts of the requests to charge.

The Court: It has already been noted.

Mr. Rassner: May I respectfully ask your Honor to charge as where you have indicated "Allowed" (handing to the Court)?

555 The Court: The master is under the duty to look after the safety and care of a seaman, whether he asks for treatment or not.

The defendant had a legal right to a physical examination of the plaintiff before trial as to the nature and extent of his disability.

The defendant had a legal right to examine the plaintiff orally as to each and every claim of negligence upon which he predicted his cause of action.

All that means is that the plaintiff could examine the defendant and the defendant could examine the plaintiff to get the testimony in advance of the trial.

556 Mr. Rassner: Will your Honor entertain a request to charge?

The Court: No, it is too late.

Mr. Rassner: Very well. I merely was going to ask that you amplify what constitutes negligence. There wasn't a word said about that.

The Court: I told them that negligence—the classical definition that of the mythical reasonable man in similar or like circumstances.

(Whereupon the marshal was sworn and the jury retired at 2:16 p. m.)

(At 4:15 p.m. the following occurred:)

1657

The Court: The jury wants some of the records. Would it be all right to send in all of the records?

Mr. Rassner: What did they ask for?

The Court: "Rough logbook at Tsingtao and the medical records."

Mr. Gray: We might as well send in every record on that.

(Exhibits sent in to the jury.)

(At 6:20 p.m. the jury returned to the courtroom.)

The Court: I understand from the note that just came in from the jury that you wanted to know something about the Jones Act.

1658

The Forelady: Yes, there is a little controversy.

The Court: Well: Well, I haven't the statute here, and it is quoted in a number of different places, but I might perhaps go over what I have already told you, that the Jones Act does give a right of action to an injured seaman for damages for injuries sustained, resulting in whole or in part from the negligence of any officer, agent or employee of the employer. In this case the employer is to be treated as the defendant in this case.

As I told you, as I understood it, the issue in this case was whether the defendant, that is, the steamship company, was negligent in the two respects that I mentioned: one, of whether the defendant had allowed the plaintiff to become exposed to poliomyelitis, or put the plaintiff in a position where the plaintiff would be so exposed. Second, whether the defendant, that is, the steamship company, had failed to provide prompt and adequate treatment for the plaintiff after the plaintiff became ill.

1659

Now on both of those issues, under the Jones Act, the whole basis of the claim is negligence, and negligence in the respect that I have indicated, although the statute does mention other kinds of negligence, which are not involved in this case; it is, I think, the contention of the plaintiff that

the defendant, that is, the steamship company, was negligent in those two respects.

I think I have told you in a general way what negligence is. I do not know whether there is anything more I can say or amplify on in any way.

A Juror: What we wanted to find out was the reading of the clause that pertained to maintenance and cure.

The Court: Of course maintenance and cure is entirely separate from the Jones Act. It has nothing whatever to do with it, and it is irrespective of negligence. I do not think I made that clear in my main charge. It is an absolute liability on the part of the steamship company to give the injured seaman, who has either been injured or become ill in the service of the ship, his maintenance and cure for this reasonable period of time, and as I have already stated to you, that time cannot be an indefinite period. It must be a period which the jury finds is a reasonable period. I think that I covered in the main charge, what I understood from the evidence in the case would be perhaps a reasonable time.

I told the jury that that was something that they would have to determine, but I gave it as my own opinion that it couldn't run for either an indefinite time or for a long period of time, and I think I did indicate that it was my opinion that that time would probably expire at the end of 1946.

While we are on this question of maintenance and cure, there is one other fact that I did not mention although I did state that the plaintiff testified that his ordinary expenses for maintenance, that is, for board and lodging, were about $50 a week, but you will recall—and I think you were here at the time—there was some discussion this morning about the amount of maintenance, and it was, I think, stipulated or agreed by counsel that the sum of $6.00 a day, which was the figure which was taken from this union agreement, would be a reasonable amount for main-

1663

tenance, which of course has nothing to do with the amount of cure. Insofar as cure is concerned, I think I covered that that sufficiently in the main charge.

Juror No. 5: We had in mind the maintenance and cure from the present time on to a certain period.

The Court: Well that of course is for the jury to determine.

Juror No. 5: We wondered if the Jones Act had anything—

The Court: The Jones Act has nothing whatever to do with it. It is an entirely separate statute, and it is 1664
perfectly obvious because the Jones Act is for damages for injuries alleged to have resulted from the negligence of the steamship company. Maintenance and cure is an absolute liability of the ship, irrespective of negligence or fault on the part of the steamship company, and that has grown up over the years. It goes back many years, and it is a principle of the Maritime Law which has been developed for the purpose of looking after seamen who were generally regarded as what we call wards of the court.

Now is there anything that counsel would like to say?

Mr. Rassner: Yes. I would like to note my exception 1665
to that part of your Honor's instruction which mentions 1946. I think that is entirely a factual issue for the jury, and I take exception to your Honor's instruction.

The Court: I think I have explained that to the jury. I think I told them that that is merely an opinion of my own, that the jury are not bound by it. It is a question for them to determine for themselves.

Mr. Rassner: Now might I respectfully ask the Court to inform the jury that in order to succeed on the first cause of action the plaintiff does not have to prove both allegations of negligence; that either one or both is sufficient to sustain a verdict.

The Court: The statute is "resulting in whole or in part," but you have got to have some causal connection between the negligence and the injury.

Now there is one other thing, and that is a question as to what you want to do now. I have been informed by the marshal that it is rather difficult to get places to eat, unless the word goes out now, and so I have instructed him to arrange for you to have your supper at half past six, or whatever time they can get ready for you. I may say in conclusion that I am quite ready and want to stay down
1667 here to be here with the jury. All I want to do is to know what your wishes are so that I can make my plans accordingly. If you go to supper, I think probably that I would go uptown to supper myself, and I could be back here easily by half past eight.

A Juror: We can get finished before.

Another Juror: We do not have to go out to eat, sir.

The Forelady: Our question has been answered so I think we have to go back and do some arguing.

A Juror: I certainly think so.

The Court: Well, are there any other questions that you might want to ask?

1668 A Juror: May I ask you, Judge, is it necessary to bring in a verdict on both counts, or can we bring it in on one count?

The Court: I think you should, if you can, bring in a verdict on both counts. If you are unable to agree at some time with respect to one count, I suppose you can report such a disagreement.

A Juror: Then it would be a disagreement if we did not bring it in on one count.

The Forelady: Can you bring in one for the defendant and one for the plaintiff?

The Court: You treat each one separately. You can, just as I say, bring in a verdict on the first count based on negligence for the plaintiff or the defendant. You can

bring in a verdict on the second count separately for the plaintiff or for the defendant. 1669

Mr. Gray: And if they are brought in on both, the decision will be clear on which count the verdict is rendered.

The Court: Yes, as I say, separately.

A Juror: I think we might better go out and get back at seven-thirty.

The Court: Suppose you go back there and discuss that and let me know what you want to do.

(Whereupon the jury retired at 6:30 p.m.)

(Jury sent to dinner.) 1670

VERDICT.

(At 8:47 p.m. the jury returned to the courtroom.)

The Clerk: Madam Forelady, have you arrived at a verdict?

The Forelady: We have.

The Clerk: How do you find?

The Forelady: On the first count we find for the plaintiff, one hundred thousand dollars, and on the second count for the defendant.

The Court: For the defendant?

The Forelady: Yes. 1671

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded: You say you find for the plaintiff on the first count in the sum of $100,000, and for the defendant on the second count, and so say you all.

The Jury: Yes.

The Court: Is there anything you want to do now?

Mr. Gray: No, I will reserve my motions.

The Court: I want to thank the jury for their patient consideration. I am sorry to have kept you so late. I ought to have been here a little bit earlier but I got stuck in the subway, that kept me back. Thank you.

1672 *Verdict.*

The Clerk: Members of the jury, you are excused for the term.

(Jury excused.)

Mr. Gray: May I defer all motions until later, your Honor?

The Court: You let me know about these motions, when you want to make them.

Mr. Gray: May I have ten days on that?

Mr. Rassner: Judge Coxe, I would like to have you keep in mind the second cause of action, namely, on maintenance.

1673 The Court: I will reserve all motions.

1674

Plaintiff's Exhibit 4. 1675

REPORT OF ILLNESS

S. S. Edward B. Haines Voy. No. 7

Owner or Operator Cosmopolitan Shipping Co., Inc.

Date of Sailing July 31, 1945

1. The Patient

Name (In Full) McAllister, Robert Alexander
Certificate No. Z-272774
Address 235 Bertsch Street, Lansford, Pa. 1676
Rating Second Engineer Citizen or alien Citizen
Age 25 Color White Sex Male
Married or single Married
Name of nearest relative Ann McAllister
Relationship Wife Address same as above.

2. (a) In whose employment when taken ill Cosmopolitan Shipping Company, Inc.
(b) How long employed 4½ months
(c) Wages per Month $220.00 per month

3. (a) Date man signed on July 20, 1945
(b) Where New York
(c) Articles (Foreign) F. 1677
(d) Did he submit to physical examination prior to employment? Yes.
(e) By whom examined WSA (New York)
(f) Where examined 107 Washington St.

4. (a) Date Discharged December 1st, 1945
(b) Where Tsingtao, China
(c) Before whom Captain Leavitt.
(d) Amount of wages paid Advance ($76.02)
(e) Disposition personal effects Cared for by patient.

5. Date crew paid off for this voyage .....
(a) Date expected to terminate voyage: .....
(b) Port .....

1684 *Plaintiff's Exhibit 5.*

ABSTRACT OF MEDICAL HISTORY

A. or R. A. date	Diagnosis	Disposition date	Sick days
7 Dec. '45	Poliomyelitis Anterior Acute 813	T 12-18-45	11
FT 12-19-45	Poliomyelitis (same)	T 12-31-45	12

MEDICAL HISTORY

1685 (Surname) McAllister,
(Christian name(s)) Robert Alexander
Born: Place ..... Date .....
State Name of Place Date Each New Entry

Division Field Hospital #1, Sixth Medical Battalion

P. H. Reinhardt
for
L. J. Stephens
Lt. (jg) (MC) USNR.

Approved

1686 P. H. Reinhardt
for
Robert E. Shands

Lt. Comdr. (MC) USNR.
U. S. S. Repose (AH-16)
FT A—Date: 12-7-45

Diagnosis: Poliomyelitis Anterior Acute 813

Origin: Not due to own misconduct—Did not—E. P. T. E.

12-7-45 5CC Generalized weakness two weeks

PI Onset of illness was Nov. 24, 1945 with dizziness lasting four days followed by great weakness of all extremities and inability to walk, speak or swallow. Because of these

Plaintiff's Exhibit 5.

1687

complaints he was admitted to the above hospital from his ship. No definite history of headache.

Findings were normal blood counts and urine. Spinal fluid clear: 130 Cells predominately lymphacytes: Pandy test 2 plus: culture negative and Kahn test negative 660,000 units of Penicillin did not aid.

P. H. Usual Childhood Diseases

Chancroid in 1942.

P. E. Temp. normal. Physical exam. negative except for nervous findings. Pupils and eye movements normal. Facial muscles sagging and gag reflex weak. Marked weakness of left arm and legs. 1688

Knee and ankle jerks absent.

Abdominal reflexes absent.
Babinski's both normal. No definite sensory changes.
12-11-45 Blood and urine normal

Patient has more motion of toes feet and legs some twitching in left calf muscles. He's cheerful over this slight improvement.

T

—

1689

11 12-18-45 Transferred this date to Kiangwan Airfield, Shanghai, China for evacuation to a USNH in the USA for further treatment and disposition.

J. L. Frazer,
Capt. (MC) USN.
Sen. Med. Off.

(Copy illegible)

Page .....

1696 *Plaintiff's Exhibit 5.*

FIRST ENDORSEMENT
APA79/P16-4/00
(DGH:bh)

U. S. S. DAWSON (APA-79)
c/o SPO, San Fran. Cal.
17 January 1946.

From: Commanding Officer.

To: Lt. (jg) Robert A. MCALLISTER, MERCHANT MARINE (440302433).

1697

1. You reported aboard for transportation at 1040, 31 December 1945.

2. Transportation effected, detached at 1000, 17 January, 1946.

RICHARD S. CASS
s/ D. G. HOWELL

D. G. Howell
By direction.

1698

Plaintiff's Exhibit 6. 1699

Mailed: McAllister, Robert A.
c/o Bertram J. Dembo
220 Broadway
New York 7, New York

ABSTRACT FROM CLINICAL RECORD

June 14, 1946

Name McAllister, Robert A. Occupation 2d. Engr.
Age 25 years, Last Vessel SS Edward B. Haines
Furnished hospital care from January 17, 1946, to April 19, 1946 1700
Furnished outpatient care from ., 19 , to , 19
Diagnosis Poliomyelitis, acute anterior

CONDITION OF PATIENT UPON ADMISSION

Patient was in Tsingtao, China, late in November 1945, when he deevloped anorexia, later nausea and vomiting, was hospitalized and following a lumbar puncture began to have paralysis of both lower extremities. He was diagnosed poliomyelitis and treated there, and finally repatriated to this country on 1/17/46, when he was admitted to this hospital. Early in the paralytic phase, he was unable 1701 to speak or swallow and showed weakness of the face, but these gradually cleared up. He also had weakness of the left upper extremity, but much less marked than in the lower extremities.

Physical: Patient marked weakness and wasting of both lower extremities, from the hips down, more marked on the left. Moderate weakness of the left upper extremity, and slight weakness of the masseters. Abdominal reflexes absent.

JK and AJ also absent. He was completely unable to move the left lower extremity at all, but was able very feebly to pull up the right leg into a flexed position from the extended.

1

Form 1946 F
Federal Security Agency
U. S. PUBLIC HEALTH SERVICE
Sept. 1950

CLINICAL RECORD

GRAPHIC CHART, TEMPERATURE, ETC.

April 1946 — May

DATE	21	22	23	24	25	26	27	28	29	30	1	2	3	4
DAY OF DISEASE	1	2	3	4	5	6	7	8	9	10	11	12	13	14
A.M. or P.M.														
HOUR														

TEMPERATURE RE

C. 41° 40° 39° 38° 37°

F. 107° 106° 105° 104° 103° 102° 101° 100° 99° 98°

TPR. CHART

Apr 21 1946

TEN

97° 96°

99° 98° 97° 96°

TPR. CHART (B)

PULSE

150 140 130 120 110 100 90 80 70 60 50

RESP. 18 24 20 24 30 28 30 28 24 24 22 18

08

Mc Allister Robert 160 361

(Surname of patient) (Given name) (Register number)

U. S. GOVERNMENT PRINTING OFFICE 16—9351

Form 1946 P
Federal Security Agency
U. S. PUBLIC HEALTH SERVICE
Sept. 1939

CLINICAL RECORD

GRAPHIC CHART, TEMPERATURE, ETC.

May 1946.

DATE: 5 6 7 8 9 10 11 12 13 14 15–16 17 18

DAY OF DISEASE

A.M. or P.M.

HOUR: 6 12 6 12 6 12 6 12 6 12 6 12 6 12 6 12 6 12 6 12 6 12 6 12 6 12 6 12 6 12

TEMPERATURE

C.: 41° 40° 39° 38° 37°

F.: 107° 106° 105° 104° 103° 102° 101° 100° 99° 98° 97°

TPR. CHART (8)

TEN.

97° 96°

F.: 99° 98° 97° 96°

TPR. CHART (8)

PULSE

150 140 130 120 110 100 90 80 70 60 50

RESP. 20 20

* Hemiuretic Violet 16521

(Surname of patient) (Given name) (Register number)

16-9351

1678 *Plaintiff's Exhibit 4.*

6. Illness contracted: (a) Date 11/24/45
(b) Hour .....
(c) Place At Sea (aboard)
(d) To whom first reported Patrick E. Napier, Psr. Ph. M.
(e) When same day
(f) Location of vessel when illness first reported At Sea—Shanghai toward Tsingtao
(g) Sick person's version of how illness was contracted and cause thereof: .....

1679 .....

ROBERT A. MCALLISTER
(Sick persons signature)

7. Physical signs and symptoms .....
.....

8. Diagnosis (for observation).

(Stamp)

Reported to
Marine Index Bureau
60 John Street, New York
1680 Date sent 12/28/45

9. Treatment (give full details) .....
.....

10. Condition of patient on discharge from vessel no appetite, dizziness, unable to hold food on the stomach—weak.

11. Final disposition of patient .....
.....

12. If sent to hospital, state where, when admitted, and at whose request Division Field Hospital #1, 6th Marine Div. Tsingtao, China. Admitted 11/30/45. Lt. Cmdr. D. J. Giorgio USN—MC.

Plaintiff's Exhibit 5. 168

13. Probable period of disability .....

14. Witnesses version as to whether disability due to misconduct .....
.....

15. If ill before embarkation, by whom treated No.
(a) Where ..... (b) How long .....

16. Similar previous illness if any: (a) When .....
(b) Where ..... (c) Detail .....
.....

17. Remarks 168
.....

Names of Persons Who Knew of Illness and Treatment Afforded

Patrick E. Napier, Purser/Ph. M.
Home and Mailing Addresses
Route 12.Box 220 Sayler Park
Station—Cincinnati 33, Ohio

Plaintiff's Exhibit 5. 168

MERCHANT MARINE.

ABSTRACT OF SERVICE

(Surname) McAllister,
(Christian name(s)) Robert Alexander
(Place) Born New York
(Date 6-16-20
USS Repose (AH-16) 12-7-45—12-18-45
US Fleet Hosp. 103 12-19-45—12-31-45

Page .....

1690 *Plaintiff's Exhibit 5.*

MEDICAL HISTORY

(Surname) McAllister
(Christian name(s)) Robert Alexander
Born: Place New York Date 6-16-20
State Name of Place Date Each New Entry
U. S. Fleet Hospital No. 103
F Date: 12-19-45
T Diagnosis: Poliomyelitis, Anterior Acute No. 813
Not misconduct. DNEPTE

1691 PI: On Nov. 24, 1945 had headache, dizzyness that lasted four days followed by inability to chew food. Then had inability to walk, generalized weakness, difficulty talking. Admitted to Div. Fld. Hosp. No. 1 6th Med. Bn. with those complaints. Dec. 7 transferred to U. S. S. Repose (AH-16) Spinal tap done, penicillin given with no improvement of condition. Dec. 18 flown from Shanghai, China to Guam for further evacuation to U. S.

PE: Patient in very good spirits. Has weakness of masseter muscles, some loss of gag reflex, generalized weakness of facial muscles. Eye movements normal. Weak-
1692 ness of left hand clasp and left arm. Left leg weak, unable to move; can move toes of left foot, some extension of ft. knee jerk absent.

Page .....

MEDICAL HISTORY

State Name of Place Date Each New Entry
Abdominal reflex absent on left side, sluggish on right. Cremasterius absent. Pt. quite cheerful over improvement made in past week.

Plaintiff's Exhibit 5. 1693

T 12-31-45 Transferred this date to a USNH within the continental limits of the USA for further treatment and disposition.

W. W. Holmes
Lt. (jg) (MC) USNR

Approved:

D. S. MacKinnon
Lt. Comdr. MC USNR
Chief of Medicine

NH44-103/P16-4/00 1694
JDR/AWP/hs

U. S. FLEET HOSPITAL NO. 103
c/o FLEET POST OFFICE
San Francisco, California

31 December 1945

From: The Medical Officer in Command,
To: Lt (jg) Robert A. MCALLISTER, MERCHANT MARINE (440302433).
Reference: (a) NAVMED Form 'G'.

1. Upon receipt of these orders you will regard yourself detached from your present duties and will proceed, via Government Transportation furnished you, to a port in the United States, where upon arrival you will further proceed to the nearest U. S. Naval Hospital, reporting to the Medical Officer in Command thereof for the further treatment and disposition. 1695

2. Delivered and detached this date.

JAS. D. RIVES
s/ A. W. PENROD

A. W. Penrod
By direction

1702 *Plaintiff's Exhibit 6.*

Laboratory: CBC negative except for WBC of 12,100 with 60% PMN. Urine negative. Kahn negative.

Course: Patient was immediately started on physiotherapy, hot packs to relieve muscle spasm, followed by graduated exercises. He spent much of his time in the P. T. Department, and showed a good improvement, in that he was able to sit up in a wheel chair and wheel himself about when he left, whereas on admission he had been completely bed ridden and unable to sit up at all. He left to continue treatment at the Stapleton Marine Hospital,
1703 where he would be nearer to his wife and children and arrangements were completed for his transportation there by air.

The prognosis in this case was good, but will have paralysis of lower extremities.

[Impression, Service Seal]

WM. Y. HOLLINGSWORTH
Surgeon, United States Public Health Service, in Charge.

Wm. Y. Hollingsworth, Medical director
Medical Officer in Charge

1704. U. S. Marine Hospital
(Station)

San Francisco 18, California
(Address)

WYH/sp

Plaintiff's Exhibit 7.

170

CLINICAL RECORD

BRIEF

Hospital US Marine Hospital, Stapleton, SI
Register No. 165361
(Surname of patient) McAllister, Robert
(Given name) .....
Class of beneficiary MS Occupation Engineer
Permanent address 235 West Bertsch, Lansford, Pa.
Name of nearest relative or friend Ann Mcalister 170
Address of nearest relative or friend same
Age of patient 25 Date of birth July 16, 1920 Sex Male
Race W Nativity USA Religion RC
Length of time in this city 5 Hours How long in United States if foreign born .....
Naturalized (Yes or no) Date .....
Legal residence (State) NY Marital state Married
Husband (or wife) of Ann Mcalister
Father's name Alexander McAlister
Mother's maiden name Rosanne Campbell
Father's birthplace Ireland Mother's birthplace Ireland
Source (Name and class of vessel) SS Edward B. Haines 170
of (Home port, where permanent document issues) NYC Date of last service Dec. 1945 Authority 2.315
Date and hour admitted 4-21-46 7:30 PM
Condition on arrival Ambulance Ward assigned DL 604

R. DORSEN
Admitting Officer.

Diagnosis (Number) T. and I. 27 564 (Name) Paralysis, flaccid following poliomyelitis involving entire left side of body.
Date of diagnosis 4/21/46
Additional diagnosis or complication .....
.....

1708 *Plaintiff's Exhibit 7.*

Operation (Number) ..... (Name) ..... (Date) .....
Anesthetic ..... Surgeon .....
Operation (Number) ..... (Name) ..... (Date) .....
Anesthetic ..... Surgeon .....
Disposition Discharged to Polio foundation for further Rx
Condition on disposition Improved
Date of disposition 5/9/46 Autopsy: Yes—No.

R. V. HOLMAN
Ward Surgeon.

1709

CLINICAL RECORD

FAMILY AND PERSONAL HISTORY

Occupation M. S.

Habits:
(1) Alcohol Moderate
(2) Tobacco pack/day
(3) Drugs, etc. none

Family History: none
Non-contrib.

1710 Previous Personal History:
(1) Last Tropical Service and Port
December 1945—Guam
(2) Diseases
Childhood diseases S complications.
(3) Injuries none
(4) Venereal
Chancroid
Denies gonorrhea and syphilis

(Surname of patient) McAlister (Given name) Robert
(Register number) 165361

B. M. CARNECCHIA
Surgeon.

Plaintiff's Exhibit 7. 1711

CLINICAL RECORD

History of Present Disease

Chief Complaint (in patient's own words).
Polio sequelae.

Probable cause, date, and mode of onset of disease. Date and cause of injury. Evolution and course to admission. Subjective symptoms.

Polio 1st diagnosed Nov. 24th—involving face, left arm and both legs. Treated by Kenny Treatment. 1712
Regained use of left arm and slight use of r. leg.

(Surname of patient) McAlister (Given name) Robert
(Register number) 165361

BAL. M. CARNECCHIA
Surgeon

CLINICAL RECORD

Objective Symptoms

Physical Examination.—General appearance, weight, 1713
(normal and present), eyes, ears, nose, tongue, teeth, throat, lungs, heart, arteries, pulse, blood pressure, abdomen, intestines, liver, spleen, kidneys, skin, mucous membranes, bones, joints, muscles, glandular system, nervous system, genito-urinary system. Record abnormal findings only. Special sheets will be used for neuro psychiatric patients, and for patients in whom the principal disability is disease of the lungs or teeth. Diagnosis by name and number will be recorded on this sheet.

Date May 9, '46 Hour 1:30 P. M.

Ht. 5' 11"
Wt. 140

Plaintiff's Exhibit 7.

Pulse 90/min.
reg. rhythm and force.
BP 124/72
Hair—Blk.
Eyes—Blue
Gen'l. Emaciated white O in no acute distress, latter 2nd decade, presenting sequelae of polio.
Eyes: Corneal + React to l. and a.
Ears: Neg.
Nose: Ext. Neg.
Throat: Neg.
Lungs: Clear
Heart: No aud. murmurs No palp. chrills
Abdomen: Musculature shows atrophy.
Extremities: Atrophy of lower and left upper.

BAL. M. CARNECCHIA
(Ward surgeon)

(Surname of patient) McAlister (Given name) Robert
(Register number) 165361

Plaintiff's Exhibit 7. 1717

CLINICAL RECORD

Ward Surgeon's Progress and Treatment Record

Ward surgeons will record on this sheet the diet, treatment, complications, changes of diagnosis, intercurrent diseases, and daily progress of the case, and will initial each notation.

Date	Diet	Treatment	Daily Notes
4/22/46		25 year old M S admitted for Rx of residue of poliomyelitis. Onset Nov. 24, 1945--face, l. arm, both legs. He was treated with hot wet packs (Kenny) and regained good use of left arm and slight use of r. leg. Px: General condition good. Moderate atrophy of l. triceps and deltoid. Both lower extremities are moderately atrophied. On the right side slight adduction, abdiction and flexion of the hip is noted. On the left side there is no active motion. Foot drop, bilateral neurolog.:	1718 1719

	Left	Right
Biceps	III	III
Triceps	II	III
Radio penostreal	II	III
KJ	0	0
AJ	I	II
cremaster	II	II

Physiotherapy will be instituted. Warm baths, active and passive exercises. (Copy illegibile)

(Surname of patient) McAllister (Given name) Robt. (Register number) 165381

1720 *Plaintiff's Exhibit 7.*

CLINICAL RECORD

WARD SURGEON'S PROGRESS AND TREATMENT RECORD

Ward surgeons will record on this sheet the diet, treatment, complications, changes of diagnosis, intercurrent diseases, and daily progress of the case, and will initial each notation.

Date	Diet	Treatment	Daily Notes
4-21-46		Pt. was taken off ship in Dec. 1945 and hospitalized for poliomyelitis anterior. Pt. has been under treatment at San Francisco Marine Hospital and was flown to this hospital—being nearer to his home. P. F. Schmit, Dr. Diagnosis—Poliomyelitis anterior—old. R. Donen (1) Reg. Diet (2) Routine care (3) Complete urine analysis (4) CAC (5) W and K. R. Donen	
4/26/46	MAG	Foot Board Carnecchia	
4/29/46	Hi caloric diet LD √	Dr. Strax BMC Muscle Testing Chart Dr. Strax Sopranol Oint. to Eruption Dr. Strax	
5/ 6/46	MAG	Sinusoidal Current. Dr. Michele	

(Surname of patient) McAlister (Given name) Robert
(Register number) 165361

Plaintiff's Exhibit 7. 1723

CLINICAL RECORD

Ward Surgeon's Progress and Treatment Record

Ward surgeons will record on this sheet the diet, treatment, complications, changes of diagnosis, intercurrent diseases, and daily progress of the case, and will initial each notation.

Date	Diet	Treatment	Daily Notes
1946			
5/9		Discharge	1724
		B. M. C.	
5/9/46		Discharge summary	
		Admitted on 4/21/46 from the U. S. Marine Hosp., San Francisco with polio which came on in Nov. 1945. He had been treated with the Kenny method. While here the patient received PT but was transferred to the Infantile Paralysis foundation for further Rx.	
		R. V. Holman	1725

(Surname of patient) McAlister (Given name) Robert
(Register number) 165361

1726 *Plaintiff's Exhibit 7.*

CLINICAL RECORD

Nurse's Progress and Treatment Record

Hour	Date	Medication	Diet	Daily Notes
8:15	4/21/46			Admitted via stretcher Polio, Ant. old C. G.
6 a. m.	22			Slept well K. P.
1727	4/22		Reg.	To P. T.— No complaints D. P.
	4/23/46		Regular	No complaints Self care A. W. H.
	4/24		Reg.	Up in wheel chair No complaints L. S.
	4/25		Reg.	Up in wheel chair Self care Usual day
1728				L. S.
	4/26		Reg.	Up in chair Self care Usual day L. D.
	4/27		Reg.	Up in chair Self care Usual day L. D.
	4/28		Reg.	Self care Usual day L. D.

(Surname of patient) McAlister (Given name) Robert
(Register number) 165361

Plaintiff's Exhibit 7. 1729

CLINICAL RECORD

NURSE'S PROGRESS AND TREATMENT RECORD

Hour	Date	Medication	Diet	Daily Notes
	4/29		Hi cal.	In wheel chair To P. T. Good day M. A. G.
	4/30		Hi cal.	In wheel chair No complaints 1730 M. A. G.
	5/1		Hi cal.	Comfortable day B. S.
	5/2		Hi cal.	No special complaints To P. T. daily M. A. G.
	5/3	P. T. daily	Hi cal.	In wheel chair Comfortable A. H.
	5/4	P. T. daily	Hi cal.	Up in chair No complaints 1731 A. H.
	5/5	P. T. daily	Hi cal.	No complaints Up in chair B. S.
	5/6	P. T. daily Diathermy massage Sinusoidal added to P. T.	Hi cal.	Routine Care
	5/7	P. T. daily	Hi cal.	In wheel chair most of day Comfortable M. A. G.

1732 *Plaintiff's Exhibit 7.*

5/8	P. T.	Hi cal.	Up in chair A. H.
5/9			Pass. this A. M. Discharged 1:30 P. M. M. A. G.

(Surname of patient) McAlister (Given name) Robert
(Register number) 165361

1733

CLINICAL RECORD

Examination of Urine

Quantity in 24 hours ..... Color ..... Odor .....
Sp. gr. 1.010. Reaction when passed Ac. Albumin 0.
Sugar 0. Mucus ..... Bile ..... Blood ..... Urea (24 hours) ..... Casts (kinds) ..... Bacteria .....
Epithelia ..... Pus ..... Miscellaneous .....

Examination of Stomach Contents

1734 Test meal (kind) ..... Reaction ..... Free HCl .....
Combined HCl ..... Lactic acid ..... Organic acids ..... Total acidity ..... Pepsin ..... Blood .....
Mucus ..... Bile ..... Bacteria ..... Cells .....
Parasites ..... Miscellaneous .....

Note.—If acidity is charted, attach chart.

Examination of Feces

Color ..... Consistence ..... Reaction ..... Mucus ..... Pus ..... Free blood (color) ..... Occult blood ..... Blood cells ..... Undigested food ..... Free fat ..... Crystals ..... Bile acids ..... Pathogenic bacteria ..... Parasites ..... Ova ..... Miscellaneous .....

Plaintiff's Exhibit 7.

1735

EXAMINATION OF SPUTUM

Quantity (24 hours) ..... Color ..... Character .....
Blood (color) ..... Tubercle bacilli ..... Pneumococci
(type) ..... Other bacteria ..... Miscellaneous .....

NOTE.—A final negative report for tubercle bacilli should not be made until after examination of ten specimens, all procured on different days.

EXAMINATION OF BLOOD

Number of red corpuscles ..... Number of white 1736
corpuscles ..... Abnormal forms .....
Hemoglobin percent ..... Parasites .....
Differential count: Small Mononuclears .....
Large Mononuclears ..... Transitionals .....
Myelocytes ..... Normoblasts .....
Megaloblasts ..... Polymorphonuclears: (1)
Eosinophiles ..... (2) Neutrophiles .....
(3) Basophiles ..... Agglutination reactions
..... Complement fixations: Wassermann
..... Kahn ..... Pathogenic bacteria
(culture) ..... Miscellaneous .....

NOTE.—AGGLUTINATION REACTIONS.—Typhoid, paraty- 1737
phoid A and B, Weil-Felix, specific dysentery. COMPLEMENT FIXATIONS.—Syphilis (state antigens used and give degree if positive), gonococcus, tuberculosis, other fixation reactions.

EXAMINATION—MISCELLANEOUS

Spinal puncture, other puncture fluids, blood chemistry, etc.
.....
.....
.....
..... Lawrence Sophier
(Date) Pathologist.

1738 *Plaintiff's Exhibit 7.*

(Surname of patient) McAlister (Given name) Robert
(Register No.) 165361 (Ward) 604

(Stamp)
Arthur A. Michele
Surgeon, (R) USPHS
Chief of Orthopedic Service Apr 22 1946

CLINICAL RECORD

1739

EXAMINATION OF URINE

Quantity in 24 hours ..... Color ..... Odor .....
Sp. gr. ..... Reaction when passed ..... Albumin
Sugar ..... Mucus ..... Bile ..... Blood .....
Urea (24 hours) ..... Casts (kinds) ..... Bacteria
..... Epithelia ..... Pus ..... Miscellaneous .....

EXAMINATION OF STOMACH CONTENTS

Test meal (kind) ..... Reaction ..... Free HCl .....
Combined HCl ..... Lactic acid ..... Organic acids
1740 ..... Total acidity ..... Pepsin ..... Blood .....
Mucus ..... Bile ..... Bacteria ..... Cells .....
Parasites ..... Miscellaneous .....

NOTE.—If acidity is charted, attach chart.

EXAMINATION OF FECES

Color ..... Consistence ..... Reaction ..... Mucus
..... Pus ..... Free blood (color) ..... Occult blood
..... Blood cells ..... Undigested food ..... Free fat
..... Crystals ..... Bile acids ..... Pathogenic bacteria ..... Parasites ..... Ova ..... Miscellaneous
.....

Plaintiff's Exhibit 7. 1741

EXAMINATION OF SPUTUM

Quantity (24 hours) ..... Color ..... Character .....
Blood (color) ..... Tubercle bacilli ..... Pneumococci
(type) ..... Other bacteria ..... Miscellaneous .....

NOTE.—A final negative report for tubercle bacilli should not be made until after examination of ten specimens, all procured on different days.

EXAMINATION OF BLOOD

Number of red corpuscles ..... Number of white 1742
corpuscles ..... Abnormal forms .....
Hemoglobin percent ..... Parasites .....
Differential count: Small Mononuclears .....
Large Mononuclears ..... Transitionals .....
Myelocytes ..... Normoblasts .....
Megaloblasts ..... Polymorphonuclears: (1)
Eosinophiles ..... (2) Neutrophiles .....
(3) Basophiles ..... Agglutination reactions
..... Complement fixations: Wassermann
Mazzini—Negative Kahn Negative Pathogenic bacteria
(culture) ..... Miscellaneous .....

NOTE.—AGGLUTINATION REACTIONS.—Typhoid, paraty- 1743
phoid A and B, Weil-Felix, specific dysentery. COMPLEMENT FIXATIONS.—Syphilis (state antigens used and give degree if positive), gonococcus, tuberculosis, other fixation reactions.

EXAMINATION—MISCELLANEOUS

Spinal puncture, other puncture fluids, blood chemistry, etc.
.....
.....
.....
..... Lawrence Sophier
(Date) Pathologist.

1744 *Plaintiff's Exhibit 7.*

(Surname of patient) McAlister (Given name) Robert
(Register No.) 165361 (Ward) 604

(Stamp)
Arthur A. Michele
Surgeon, (R) USPHS
Chief of Orthopedic Service May 3 1946

May 2nd, 1946.

To Whom It May Concern:

1745 This is to state that Robert McAllister, a 35 year old Merchant Seaman, has been treated at this hospital for infantile paralysis.

He is being released at his own request for further treatment by the Infantile Paralysis Foundation.

By Direction of the Medical Officer in Charge

Respectfully,

John J. Davies
S. A. Surgeon, USPHS

JJD:MG

165361

1746 Marine Hospital Stapleton, S. I. N. Y.
May 9, 46

Mc Allister Robert
Hospital Hospital
April 21, 46 May 9, 46
MS Un-changed
No further need of hospitalization.
Dec. 1945 SS Edward B. Haines

USA
July 16, 1920
white
fair
5′ 9″
blue
brown

Dr. R. V. Holman

Plaintiff's Exhibit 7. 1747

GREATER NEW YORK CHAPTER
OF THE NATIONAL FOUNDATION FOR INFANTILE PARALYSIS, INC.
17 East 42nd Street, New York 17, N. Y.
MUrray Hill 2-0627

May 8, 1946

Dr. Holman
U. S. Marine Hospital
Stapleton, Staten Island

Dear Dr. Holman:

In connection with examination of polio patient, Robert 1748
McAllister, by Dr. George G. Deaver at Bellevue Hospital, New York City, there will be no cost whatsoever to the Marine Hospital. Any expense incurred by Mr. McAllister's visit is being taken care of by the Greater New York Chapter.

Sincerely yours,

KATHERINE E. MORAN
Katherine E. Moran
Executive Secretary

KEM:DD

1749

WESTERN UNION

1947 APR 17 PM 10 51

WB562 GOVT NL PD=WASHINGTON DC 17
U S PUBLIC HEALTH SERVICE=
U S MARINE HOSPITAL STATEN ISLAND NY=

ROBERT ALEXANDER MCALLISTER, Z-272774, CLAIMS HOSPITALIZATION. WIRE VERIFICATION INDICATING DATES OF ADMITTANCE AND DISCHARGE, NATURE OF DISABILITY AND PE-

1750 *Plaintiff's Exhibit 7.*

RIODS OF RECUPERATION RECOMMENDED. IN REPLY REFER TO FILE NO. M. P. 8580=
C W SANDERS ASST DIRECTOR FOR MARINE PERSONNEL MARINE DIVISION.

Z-272774 M. P. 8580.

TELEGRAM

FEDERAL SECURITY AGENCY
1751 WASHINGTON

CHARGE U. S. PUBLIC HEALTH SERVICE, APPROPRIATION FOR

Message sent via Western Union.

(The appropriation from which payable must be stated on above line)

OFFICIAL BUSINESS—GOVERNMENT RATES

U. S. MARINE HOSPITAL—April 18, 1947.

Mr. C. W. Sanders, Asst. Director
for Marine Personnel—Marine Division
1752 U. S. Maritime Service—Washington, D. C.

Reurtel Robert Alexander McAllister Z-272774 was hospitalized from April 21, 1946 to May 9, 1946 treated for Paralysis, flaccid, following poliomyelitis, involving entire left side of body He requested discharge so that he could be treated by the Infantile Paralysis Foundation.

COLLECT: Superintendent.
T. B. H. ANDERSON
T. B. H. Anderson,
Medical Director, USPHS.,
Medical Officer in Charge.

Message sent: 3:25 P. M.—4/21/47

Plaintiff's Exhibit 8.

1753

STIPULATION OF COUNSEL.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ROBERT MCALLISTER, *Plaintiff*, v. COSMOPOLITAN SHIPPING CO., INC., *Defendant*.	Civ. 36—769.

1754

Before: Hon. JOHN C. KNOX, District Judge.

New York, January 28, 1948;
11.00 o'clock a. m.

APPEARANCES:

BERTRAM J. DEMBO, Esq., Attorney for Plaintiff; Jacob Rassner, Esq., of Counsel.

HORACE M. GRAY, Esq., Attorney for Defendant.

1755

Mr. Rassner: It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the plaintiff will not claim at the trial of the above-entitled action that he was ordered to stand watch or perform his duties subsequent to the time that he reported himself to be ill to the first assistant engineer.

(Discussion between Court and counsel.)

The Court: To whom did you report your illness?

The Plaintiff: The first assistant engineer.

1756 *Plaintiff's Exhibit 9.*

The Court: Did you ever report it to the chief engineer?
The Plaintiff: It was the first assistant.
The Court: Did you ever report it to the chief engineer?
The Plaintiff: No, not directly.

Plaintiff's Exhibit 9.

THIS AGREEMENT made April 6th, 1945, by and between NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION
1757 (hereinafter referred to as "Association") and COSMOPOLITAN SHIPPING COMPANY, INC., as General Agent for the War Shipping Administration (hereinafter referred to as the "General Agent").

WITNESSETH:

In compliance with the direction of the Administrator, War Shipping Administration to the General Agent, it is agreed that the following terms and conditions shall be adopted only with respect to the employment of licensed engineer officers on United States flag ocean-going dry
1758 cargo vessels owned by or under requisition bareboat or bareboat charter to or operated by the War Shipping Administration and allocated under a General Agency Agreement to said General Agent:

Section 1. *Recognition, Preferential Hiring and Union Maintenance:*

The Association is recognized as the representative of the engine room officers employed upon such vessels for the purpose of collective bargaining pursuant to the decision and certification of the National Labor Relations Board in Case No. 2-R-4659, dated July 13, 1944.

Preferential employment shall be given members of the

 1759

Marine Engineers' Beneficial Association in the filling of vacancies when available, provided they are qualified to fill such positions. The owner shall have the right to select his own employee provided such employee is a member of the Marine Engineers' Beneficial Association in good standing; and he shall be required to remain in good standing during the life of this agreement.

Section 2. *Grievance Procedure and Arbitration:*

During the life of this agreement there shall be no strikes, lockouts or stoppage of work for any cause. All 1760
disputes relating to the interpretation of this agreement shall be determined by a Personnel Relations Board, consisting of two persons appointed by the Association and two persons appointed by the General Agent. The parties shall submit any such disputes for decision by such Board and they agree to be bound by such decision. In the event that said Board shall not agree, an additional member shall be furnished by the United States Conciliation Service, and the decision of a majority of the Board shall be final. Said Board shall meet at the port agreed upon within twenty-four hours after receipt of notice from either party stating the purpose of the meeting. 1761

Upon written notice from any party hereto stating the purpose of the meeting, the Board shall meet within twenty-four hours. The Board may designate a person or persons at other ports to hear and adjudicate disputes at such ports, providing, however, that no decision of any such Local Committee shall be effective unless approved by the Personnel Relations Board.

Section 3. *Discharge:*

Nothing in this agreement shall prevent the owner from discharging any licensed engineer officer who is not satisfactory to it, but any dispute arising therefrom shall be

4651

NAVCG 705
(June 1943)

PAID Aug 6 1942
NO DISCH. 48
C. M. Eubanks

UNITED STATES COAST GUARD
SHIPPING ARTICLES

(R. S. 4612, as amended—U. S. C., title 46, sec. 713)

Notice is hereby given that section 4519 of the U. S. Revised Statutes (U. S. C., title 46, sec. 577) makes it obligatory on the part of the master of a merchant vessel of the United States, at the commencement of every voyage or engagement, to cause a legible copy of the agreement (forecastle card), omitting signatures, to be placed or posted up in such part of the vessel as to be accessible to the crew, under a penalty not exceeding ONE HUNDRED DOLLARS.

DEFENDANT'S Exhibit A.
Duplicate
4651

2 Sep 2574

ARTICLES OF AGREEMENT BETWEEN MASTER AND SEAMEN IN THE MERCHANT SERVICE OF THE UNITED STATES

Required by Act of Congress, Title LIII, Revised Statutes of the United States (U. S. C., title 46, chap. 18)

NAME OF SHIP	OFFICIAL NO.	PORT OF REGISTRY	DATE OF REGISTER	REGISTERED TONNAGE Gross	REGISTERED TONNAGE Net	VOYAGE No.
S.S. Edward B. Haines	245356	Baltimore, Md.		7210	4381	7

OPERATING COMPANY ON THIS VOYAGE Name	Address (State number of house, street and town)	NUMBER OF SEAMEN AND APPRENTICES FOR WHICH ACCOMMODATION IS CERTIFIED	CLASS OF SHIP
COSMOPOLITAN SHIPPING CO., INC. AS GENERAL AGENT FOR THE UNITED STATES	42 Broadway, NY		Steam Cargo

Office of the SHIPPING COMMISSIONER FOR THE PORT OF New York, July 23, 1945

IT IS AGREED between the Master and seamen, or mariners, of the Bert Ray Seamster Lic # 174665 Steward Master
of Baltimore, Md *of which* New York
is at present Master, or whoever shall go for Master, now bound from the Port of[1] _____, *to*

A PORT IN THE ATLANTIC OCEAN TO THE EASTWARD OF NEW YORK AND THENCE TO SUCH PORTS IN ANY PART OF THE WORLD AS THE MASTER MAY DIRECT OR AS MAY BE ORDERED BY THE UNITED STATES GOVERNMENT OR ANY DEPARTMENT, COMMISSION OR AGENCY THEREOF

and/or first port of loading, Master's Option

A PORT IN THE ATLANTIC OCEAN TO THE EASTWARD OF NEW YORK AND THENCE TO SUCH PORTS IN ANY PART OF THE WORLD AS THE MASTER MAY DIRECT OR AS MAY BE ORDERED BY THE UNITED STATES GOVERNMENT OR ANY DEPARTMENT, COMMISSION OR AGENCY THEREOF

and/or first port of loading, Master's Option

as other ports and places in any part of the world as the Master may direct, and back to a final port of discharge in the United States, for a term of time not exceeding 12 *calendar months.*[2]

GOING ON SHORE IN FOREIGN PORTS IS PROHIBITED EXCEPT BY PERMISSION OF THE MASTER

NO DANGEROUS WEAPONS OR GROG ALLOWED, AND NONE TO BE BROUGHT ON BOARD BY THE CREW

SCALE OF PROVISIONS to be allowed and served out to the Crew during the voyage in addition to the daily issue of lime and lemon juice and sugar, or other anti-scorbutics in any case required by law

		Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Water	quarts	5	5	5	5	5	5	5
Biscuit	pound	½	½	½	½	½	½	½
Beef, salt	pounds			1¼		1¼		1¼
Pork, salt	pound		1		1		1	
Flour	pound	½		½		½		
Canned meat	pound	1						
Fresh bread	pounds	1½	1½	1½	1½	1½	1½	1½
Fish, dry, preserved, or fresh	pound						1	
Potatoes or yams	pound	1	1	1	1	1	1	1
Canned tomatoes	pound	½						
Peas	pint			½			½	
Beans	pint		½		½			
Rice	pint		½					
Coffee (green berry)								½
Tea								
Sugar								
Molasses								
Dried fruit								
Pickles								
Vinegar								
Corn meal								
Onions								
Lard								
Butter								
Mustard, pepper, and salt sufficient								

		Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Coffee (green berry)	ounces	½	½	½	½	½	½	½
Tea	ounces	½	½	½	½	½	½	½
Sugar	ounces	3	3	3	3	3	3	3
Molasses	pint	½		½		½		
Dried fruit	ounces	3		3		3		
Pickles	pint		½		½		½	
Vinegar	pint			½				½
Corn meal	ounces	4				4		
Onions	ounces	4				4		4
Lard	ounces	1	1	1	1	1	1	1
Butter	ounce	2	2	2	2	2	2	2
Mustard, pepper, and salt sufficient for seasoning.								

SUBSTITUTES

One pound of flour daily may be substituted for the daily ration of biscuit or fresh bread; two ounces of desiccated vegetables for one pound of potatoes or yams; six ounces of hominy, oatmeal, or cracked wheat, or two ounces of tapioca, for six ounces of rice; six ounces of canned vegetables for one-half pound of canned tomatoes; one-eighth of an ounce of tea for three-fourths of an ounce of coffee; three-fourths of an ounce of coffee for one-eighth of an ounce of tea; six ounces of canned fruit for three ounces of dried fruit; one-half ounce of lime juice for the daily ration of vinegar; four ounces of oatmeal or cracked wheat for one-half pint of corn meal; two ounces of pickled onions for four ounces of fresh onions.

When the vessel is in port and it is possible to obtain the same, one and one-half pounds of fresh meat shall be substituted for the daily rations of salt and canned meat; one-half pound of green cabbage for one ration of canned tomatoes; one-half pound of fresh fruit for one ration of dried fruit. Fresh fruit and vegetables shall be served while in port if obtainable. The seamen shall have the option of accepting the fare the Master may provide, but the right at any time to demand the foregoing scale of provisions.

The foregoing scale of provisions shall be inserted in every article of agreement, and shall not be reduced by any contract, except as above, and a copy of the same shall be posted in a conspicuous place in the galley and in the forecastle of each vessel.

And the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said Master, or of any person who shall lawfully succeed him, and of their superior officers, in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, or on shore; and in consideration of which service to be duly performed the said Master hereby agrees to pay to the said crew, as wages, the sums against their names respectively expressed, and to supply them with provisions according to the foregoing scale. And it is hereby agreed, that any embezzlement or willful or negligent destruction of any part of the vessel's cargo or stores shall be made good to the owner out of the wages of the person guilty of the same. And if any person enters himself as qualified for a duty which he proves himself incompetent to perform, his wages shall be reduced in proportion to his incompetency. And it is also agreed that if any member of the crew considers himself to be aggrieved by any breach of the agreement or otherwise, he shall represent the same to the Master or officer in charge of the ship in a quiet and orderly manner, who shall thereupon take such steps as the case may require.

It is also agreed that W.S.A. Operations Regulation No. 55, No. 64 (Revised) & No. 72 shall apply to these articles

ALL DECISIONS, AMENDMENTS AND ATTACHMENTS OF THE MARITIME WAR EMERGENCY BOARD SHALL APPLY

IN WITNESS WHEREOF the said parties have subscribed their names hereto on the days against their respective signatures mentioned.

B. R. Seamster, Master, of Son - Raymond Plainfield, NJ (Give address)

on the 23rd *day of* July, 19 45

The authority of the owner or agent for the allotments mentioned in these articles is in my possession.

H. E. Wright
Shipping Commissioner or Consular Officer.

The Shipping Commissioner or Consular Officer will sign if such authority has been produced and will strike out the ink if it has not

[1] Here the voyage is to be described, and the places named at which the ship is to touch; or, if that cannot be done, the general nature and probable length of the voyage is to be stated, and the port or country at which the voyage is to terminate.

[2] If the ie words are not necessary they must be stricken out.

[3] Sec. 4608, R. S., prohibits the wearing of sheath knives on shipboard, and the Master informs the crew of this law.

[4] Here any other stipulations may be inserted to which the parties agree, and which are not contrary to law.

N. B.—This form must not be unstitched. No leaves may be taken out of it, and none added or substituted. Care should be taken at the time of engagement that a sufficiently large form is used. If more men are engaged during the voyage than the number for whom signatures are provided in this form, an additional form should be obtained and used.

Any Erasure, Interlineation, or Alteration in this Agreement will be void, unless attested by a Shipping Commissioner, Consul General, Consul, or Consular Agent, to be made with the consent of the persons interested

16—8419-6

1762 *Plaintiff's Exhibit 9.*

settled in accordance with Section 2 and the terms of settlement shall include a provision as to the payment of wages from the date of discharge.

Section 4. *Passes to Union Representatives:*

Authorized representatives of the Association shall have the right to go on board ships covered by this agreement at all reasonable times, subject to military regulations and any other regulations mutually satisfactory to the Association and the General Agent, for the purpose of
1763 consulting with the engine room officers employed thereon.

The Association shall take out insurance which will protect the shipowner, charterer, operators and the General Agent and subsidiary or affiliated companies against any claims, loss of life, or injury occurring to a representative of the Association while on the property or while on board a vessel allocated to any of the abovementioned assured while said property or said vessel is owned, chartered or leased, by or to either and shall furnish satisfactory evidence of such insurance to each of the said assured.

Section 5. *Classification of Vessels:*

1764 For the purposes hereof, vessels shall be defined into the following classifications:

SINGLE SCREW

Class	*Power Tonnage*
A	17,001 and over
B	12,001 to 17,000
C	7,501 to 12,000
D	5,001 to 7,500
E	Less than 5,001

Plaintiff's Exhibit 9.

1765

TWIN SCREW

Class	*Power Tonnage*
A-3	35,001 and over
A-2	28,001 to 35,000
A-1	20,001 to 28,000
A	15,001 to 20,000
B	9,001 to 15,000
C	5,501 to 9,000
D	3,501 to 5,500
E	Less than 3,501

1766

Power tonnage consists of the number of gross tons added to the horsepower of the vessel as shown in *Merchant Vessels of the United States,* published by the Bureau of Navigation of the Department of Commerce of the United States. On Twin-engine single screw vessels, the sum of $10 per month shall be paid to each licensed engineer officer in addition to his regular wages.

Section 6. *Wages:*

(a) Licensed engineer officers of the classifications hereby designated (or equivalent classifications regardless of what titles may be used by the owner or the General Agent) shall be paid the following monthly wages, together with subsistence, quarters, maintenance and cure, as customary.

1767

(b) The wages specified below shall be made effective on June 1, 1944, for licensed engineers on all such vessels in port or at sea in all instances where the monthly wages received by such engineers prior to June 1, 1944, were lower than those prescribed below.

(c) The wages specified below shall be made effective as of the first termination of articles on or after June 1, 1944, for licensed engineers who received, prior to June 1, 1944, monthly wages higher than those prescribed below.

768 *Plaintiff's Exhibit 9.*

(d) In any instance where an established length of service wage increase arrangement is in effect, increases above the rates specified below may be paid in accordance with the provisions of such arrangement.

(e) No licensed engineer who, prior to June 1, 1944, received a monthly wage rate higher than prescribed below shall suffer a reduction in his monthly wage, provided that such wage rate was in effect for the particular position in the particular power tonnage class of vessel prior to October 3, 1942, and provided moreover, that said licensed
769 engineer remains in the same position and with the same General Agent on a vessel in the same power tonnage classification.

Classification of Vessels and Rating	*Monthly Wages*
Class A-3	
Chief Engineer	$486.00
First Asst. Engineer	338.00
Second Asst. Engineer	268.00
Third " "	250.00
Fourth " "	233.00
770 Fifth " "	219.00
Sixth " "	205.00
Licensed Junior Engineer	190.00
Class A-2	
Chief Engineer	$432.00
First Asst. Engineer	302.00
Second Asst. Engineer	262.00
Third " "	244.00
Fourth " "	227.00
Fifth " "	213.00
Sixth " "	199.00
Licensed Junior Engineer	190.00

Plaintiff's Exhibit 9.

1771

Class A-1

Chief Engineer	$420.00
First Asst. Engineer	290.00
Second " "	256.00
Third " "	238.00
Fourth " "	221.00
Licensed Junior Engineer	185.00

Class A

Chief Engineer	$408.00
First Asst. Engineer	278.00
Second " "	244.00
Third " "	226.00
Fourth " "	209.00
Licensed Junior Engineer	179.00

1772

Class B

Chief Engineer	$396.00
First Asst. Engineer	266.00
Second " "	232.00
Third " "	214.00
Fourth " "	197.00
Licensed Junior Engineer	179.00

1773

Class C

Chief Engineer	$384.00
First Asst. Engineer	254.00
Second " "	220.00
Third " "	202.00
Fourth " "	185.00

Class D

Chief Engineer	$360.00
First Asst. Engineer	248.00
Second " "	216.00
Third " "	196.00
Fourth " "	179.00

774 *Plaintiff's Exhibit 9.*

Class E

Chief Engineer	$348.00
First Asst. Engineer	242.00
Second " "	210.00
Third " "	190.00
Fourth " "	173.00

Section 7. *Diesel Vessels:*

The salaries of licensed engineers on motor or Diesel vessels shall be 10% above the scale herein prescribed for
775 steam vessels of equal power tonnage.

Section 8. *Hours of Labor in Port:*

(a) Eight hours shall constitute a day's work.

(b) Except as provided in subsection (c) below, in all ports the master shall consider safe ports watches shall be broken one hour after "finished with engine" bell, provided the vessel is to stay in port in excess of 24 hours. The hours of Labor shall be between 8:00 a.m. and 5:00 p.m. on weekdays and between 8:00 a.m. and 12 noon on Saturdays. Except on days of arrival and departure, all work,
776 including the standing of routine watches in such ports after watches are broken between the hours of 5:00 p.m. and 8:00 a.m. on weekdays and on Saturday afternoons, Sundays and recognized holidays shall be paid for at the overtime rate. Provided, however, that in foreign ports between 5:00 p.m. and 8:00 a.m. on weekdays overtime shall only be paid while cargo is being loaded or discharged. In such situations overtime shall be paid between 5:00 p.m. and 8:00 a.m. on weekdays for work performed in excess of 8 hours.

(c) Special provision applicable to freighters carrying four or more licensed assistant engineers.

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(c-1) On all freighters carrying four or more licensed assistant engineers (excluding unlicensed assistant engineers) overtime shall be paid for all work performed, including the standing of routine watches, on Saturday afternoons, Sundays and recognized holidays, in all ports.

(c-2) On all freighters carrying four or more licensed assistant engineers (excluding unlicensed assistant engineers) overtime shall be paid for work performed in port between the hours of 5:00 p.m. and 8:00 a.m. weekdays, including the standing of routine watches, in the first United States continental port where the vessel arrives after a 1778
voyage, and the subsequent United States continental port, if any, where shipping articles are terminated and new articles are signed.

(c-3) On all freighters carrying four or more licensed assistant engineers (excluding unlicensed assistant engineers), two of the ship's regular assistant engineers may be assigned to the regular routine night watches between the hours of 5:00 p.m. and 8:00 a.m. weekdays without payment of overtime for such work performed in all ports except the first United States continental port where the vessel arrives after a voyage and the subsequent United States continental port, if any, where shipping articles are 1779
terminated and new articles are signed.

(d) Overtime shall also be paid for all work performed on all vessels, including the standing of routine watches, in excess of eight hours per day, midnight to midnight.

Section 9. *Work by Regular Crew Members after Midnight:*

When watches are broken and assistant engineers work overtime in port after midnight, they shall have a rest period during straight time hours on the same day of one hour for each hour's work performed after midnight; pro-

vided, however, that on days of departure, such rest period shall not interfere with the assistant engineers standing their regular watches.

Section 10. *Night Relief:*

(a) In all continental United States ports, relief engineers, when available and competent, shall be employed on Saturday afternoons, Sunday and recognized holidays.

(b) Relief engineers, when available and competent, shall also be employed between the hours of 5:00 p.m. and 8:00 a.m. on weekdays in continental United States ports. This provision shall apply on all vessels, except that on freighters carrying four or more licensed assistant engineers (excluding unlicensed engineers) it shall *only* apply under the following circumstances: on such freighters carrying four or more licensed assistant engineers (excluding unlicensed engineers) the provision shall apply when the vessel arrives at the first United States continental port after a voyage and in the subsequent United States continental port, if any, where the articles are terminated and new articles are signed.

Section 11. *Rates of Pay and Conditions for Night Relief Engineers:*

(a) When relief engineers are employed for routine watch at night, between the hours of 5:00 p.m. and 8:00 a.m. or on Saturday afternoons, Sundays, or holidays, they shall be paid at the rate of $9.20 per night, with a minimum of $9.20 if called to report aboard ship for work. When relief engineers are required to stand alert watch (including port security watch), they shall be paid $1.15 per hour. When relief engineers are required to perform work in addition to the duties required or incidental to security watch as defined in United States Government regulations, they shall receive 50¢ per hour while engaged in such

additional work, in addition to the regular rate of $1.15 for standing active or alert watch.

(b) When a hot meal is not furnished to relief officers standing watch at night or on Sundays or holidays, they shall be paid $1.00 additional. Night relief engineers shall be furnished suitable quarters while on board ship.

(c) When night relief engineers are required to incur traveling expense in excess of 50¢ round trip for traveling to and from the job they shall be reimbursed for such traveling expenses by the General Agent.

1784

(d) The effective date of the rates of pay prescribed in this section shall be June 1, 1944.

Section 12. *Hours of Labor at Sea:*

Four hours shall constitute a watch and two watches shall constitute a day's work. All work done at sea by assistant engineers in excess of eight hours a day, except that necessary in case of emergency for the safety of the passengers, crew, vessel, vessel's machinery or cargo, shall be paid for as overtime. No work shall be performed on Saturday afternoons, Sundays, or holidays except that necessary for the navigation and safety of the vessel, pro- 1785
vided that all licensed engineers shall stand their respective watches as required by law.

Section 13. *Confinement to Vessel; Security Watch, and Waiting for Convoy:*

(a) If licensed engineers who are not required to stand watch are required to remain aboard the vessel in any port between the hours of 5:00 p.m. and 8:00 a.m. on week days, or between 12 noon on Saturdays and 8:00 a.m. on Mondays, or on recognized holidays, they shall be paid overtime during such hours, provided the overtime shall not be paid if engineers are required to remain aboard the vessel for

reasons beyond the control of the Master. The intent of this provision is to prevent arbitrary and unnecessary denial of shore leave to licensed engineers.

(b-1) Licensed engineers shall also be paid overtime when required by Federal authorities (in United States ports or United States controlled ports) or by foreign government authorities in other ports, to be aboard vessels in port for the purpose of vessel security or for the standing of safety watches, on Saturday afternoons, Sundays and recognized holidays.

1787

(b-2) Overtime shall also be paid for all such watches stood between the hours of 5:00 p.m. and 8:00 a.m. weekdays, except on days of arrival and departure. This provision shall apply on all vessels, except that on freighters carrying four or more licensed assistant engineers (excluding unlicensed engineers) it shall *only* apply under the following circumstances: on such freighters carrying four or more licensed assistant engineers (excluding unlicensed engineers) the provision shall apply when the vessel arrives at the first United States continental port after a voyage and in the subsequent United States continental port, if any, where the articles are terminated and

1788 new articles are signed.

(c) When, however, a vessel is loaded and ready for sea and is held at anchor or at the dock awaiting naval or military orders to said in convoy, sea watches shall be set upon notification to the Master by the proper authorities that the vessel is to proceed to sea ~~and the provisions~~ for pay on sea watches shall be in effect.

Section 14. *Sea Watches and Open Harbors or Roadsteads:*

(a) On days of departure sea watches shall be set at time of sailing, but not later than noon.

Plaintiff's Exhibit 9.

(b) In all open harbors or roadsteads, overtime shall be paid for any work except routine watch or work necessary for the safety of the vessel between the hours of 5:00 p.m. and 8:00 a.m. weekdays or on Saturday afternoons, Sundays, or holidays. This paragraph shall not apply on days of arrival or departure.

Section 15. *Emergencies:*

No overtime shall be allowed for participation in fire, life boat, or other drills at any time or for maneuvering the vessel for the safety of the vessel, crew or cargo, or the saving of life aboard other vessels in jeopardy.

Section 16. *Overtime:*

(a) The rate of overtime pay of assistant engineers shall be $1.25 per hour.

(b) No less than one (1) hour's overtime shall be paid for any work performed.

(c) Overtime performed in excess of one hour shall be paid for to the next hour period following.

(d) If the interval of time between periods of overtime is less than two hours, overtime shall be paid continuously.

(e) When overtime work is to be performed, it shall be ordered by the Chief Engineer or engineer in charge, and a time slip in duplicate shall be prepared by the officer performing the work immediately after the work is completed and said time slip shall be certified by the Chief Engineer.

Section 17. *Holidays:*

The following shall be recognized as holidays: New Year's Day, Lincoln's Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Armistice Day, Thanksgiving Day, and Christmas Day.

1792 *Plaintiff's Exhibit 9.*

When in port and a holiday falls on Sunday, the following Monday shall be observed.

When a vessel is in an American port on a general Election Day, employees who are qualified registered voters shall be afforded two hours for voting.

Section 18. *Subsistence and Room Allowance in Port:*

When in port, if board and living quarters are not furnished, subsistence allowance amounting to $3.50 per day ($1.00 for breakfast $1.00 for lunch and $1.50 for dinner)
1793 and a room allowance of $2.50 per day shall be paid each licensed engineer officer.

When sent from one ship to another or from one port to another in the course of employment, licensed engineers shall be paid their regular wages and expenses incurred in traveling to and from such place of employment. All transportation by land shall be first class when available and not less than cabin class accomodations shall be furnished at sea when available. While traveling, $4 per day shall be allowed for meals.

Section 19. *Explosives:*

1794 On vessels carrying "explosives" in 50-ton lots or over, as permitted by law, licensed engineer officers shall be paid in addition to their regular monthly wages (as specified in section 6) 10% of said wages per month while such cargo is on board the vessel or is being loaded or discharged. The term "explosive" as used in this section is defined to mean: black powder, detonating caps, dynamite, blasting caps, loaded bombs, TNT, and nitro-glycerine. The above shall not apply to ship's ammunition or signaling devices, carried for the protection of the ship.

Section 20. *Penalty Cargo:*

When sulphur in amount of 25% or more of the deadweight carrying capacity is carried on a vessel, each licensed

Plaintiff's Exhibit 9. 1795

engineer officer shall be paid extra compensation of $10 per voyage.

Section 21. *Working Cargo:*

When in any port the engineers handle cargo during regular working hours, they shall be paid the overtime rate for performing such work in addition to the regular monthly compensation. When they handle cargo during normal overtime conditions, they shall receive time and one-half of the regular overtime rate. When they handle explosive cargo, they shall receive 50¢ per hour in addi- 1796
tion to the foregoing rates of pay.

Section 22. *Shifting Ship:*

(a-1) After arrival at a port of call, and while watches are broken, overtime shall be paid to licensed engineers for work performed on watch, including the standing of routine watches, on Saturday afternoons, Sundays and recognized holidays while the vessel is being moved in port.

(a-2) Overtime shall also be paid for such work be-
tween 5.00 p. m. and 8.00 a. m. on weekdays, except on days 1797
of arrival and departure. This provision shall apply on all vessels, except that on freighters carrying four or more licensed assistant engineers (excluding unlicensed engineers) it shall *only* apply under the following circumstances: on such freighters carrying four or more licensed assistant engineers (excluding unlicensed engineers) the provision shall apply when the vessel arrives at the first United States continental port after a voyage and in the subsequent United States continental port, if any, where the articles are terminated and new articles are signed.

(b) When shifting ship under her own power, time for assistant engineers in moving ship shall commence

one hour prior to the time set for departure to allow for warming up and turning over engine and time shall stop one hour after "finished with engine" bell or until relieved.

Section 23. *Arrival:*

A vessel shall be deemed to have arrived when she comes from sea and actually ties up at the dock at the port for which she is bound or anchors for the purpose of loading or discharging cargo and "finished with engines" is rung; provided, however, that anchorage of the vessel, regardless of the length of time she remains at anchor, shall not be deemed to constitute an arrival if caused by inability to obtain pilot, waiting for quarantine, daylight, berth, or because of weather or tide conditions or any other cause beyond the control of the General Agent.

Section 24. *Departure:*

Departure shall take place when a vessel is made ready for sea and "stand by" is rung.

Section 25. *Rest Before Watch:*

No licensed engineer shall be required or permitted to take charge of a watch upon leaving or immediately after leaving port, unless such officer shall have had at least six hours off duty within the twelve hours immediately preceding the time of sailing.

Section 26. *Breaking of Watches:*

Watches shall be broken one hour after finishing with engine upon arrival at a home port or port of final discharge, or any other port where the vessel is to remain to exceed 24 hours.

Plaintiff's Exhibit 9. 1801

Section 27. *Vessels out of Commission:*

When licensed engineer officers are employed on vessels out of commission, one engineer shall receive the same pay and subsistence as that of a first assistant engineer, and any other officer employed shall be paid at the rate prescribed for the rating and capacity in which he is acting for the period in which he so acts.

Section 28. *Full Complement while Working Cargo:*

No licensed engineer officer shall be laid off without pay over Saturday afternoon, Sundays, or a holiday, and a full 1802
complement of licensed engineer officers shall be employed at all times while the vessel is working cargo or in commission except when a vacancy occurs other than through the temporary laying off an officer without pay.

Section 29. *Repatriation:*

(a) If the ship is withdrawn from service for any cause or is destroyed, or if the licensed officer is discharged, except for breach or neglect of duty, at a place other than the port at which he signed articles for the voyage during which or at the termination of which the ship is so with-
drawn or destroyed, he shall be furnished first class trans- 1803
portation with meals and berth and shall be paid full wages to the home port of the ship or to the port where he signed such articles (for the voyage), as mutually agreed, provided, however, that in case the vessel is destroyed and first class transportation is not available, the General Agent will, in lieu of arranging first class transportation, cooperate with the authorities repatriating the distressed licensed officer in the best available manner to a United States continental port, and if the port to which he is so repatriated is not the port at which he signed articles for the voyage, he shall also be furnished first class transportation with meals and berth and paid full wages to the home

port of the ship or to the port where he signed the articles, as mutually agreed.

(b) The provisions of Operations Regulation No. 64, of the War Shipping Administration, as now existing or as from time to time amended, shall be applicable to licensed engineer officers under this agreement.

Section 30. *No Work away from Engine Room:*

For the safety of the passengers, crew, vessel, or her equipment or cargo, the engineer in charge of the watch
1805 while the vessel is being navigated shall not be permitted to do work that takes him away from the engine or fire room.

Section 31. *Prohibited Work:*

Licensed engineers shall not paint, chip, scale, or polish bright work or do any cleaning up work in the engine department or blow boiler tubes by hand.

Section 32. *Quarters:*

Except in circumstances created by wartime conditions,
1806 each engineer officer shall have his own individual stateroom. All officers' quarters shall be properly equipped with fresh running water, cleaned, heated and lighted at all times during occupancy. Each vessel shall provide a washroom for the use of the engineer officers only, this washroom to be equipped with fresh hot and cold running water, and fresh water shower facilities as well as sanitary drainage.

Section 33. *Vacations:*

(a) Each licensed engineer who shall have completed at least one year of continuous service shall receive a vacation of 14 consecutive days with full pay in each calendar year.

1807

(b) Vacations shall be cumulative, if mutually agreed upon, but in any event not in excess of four weeks and shall be allowed only at such time as may be convenient to the operating necessities of the service. Cash allowances, exclusive of bonuses, in lieu of vacation may be made, if mutually agreed.

(c) If after six months of continuous service, employment is terminated, the licensed engineer, unless discharged for cause, shall be entitled to such vacation as has accrued on the basis of 1/12 of the annual period per month. Continuous service shall not be deemed to be broken by temporary furloughs from the service, provided that no vacations shall accrue during such periods of furlough.

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Section 34. *Effective date and duration of Agreement:*

(a) Since this agreement applies only to employees aboard vessels owned by or while under requisition bareboat or bareboat charter to the War Shipping Administration, the terms and provisions hereof shall not be binding and effective as to such employees until all of the terms and provisions hereof shall have been approved by the War Shipping Administration.

1809

(b) Any provisions of this agreement not in effect at the time of signing shall become effective as of the first signing of shipping articles on or after the date of approval by the War Shipping Administration.

(c) The provisions of this agreement shall remain in full force and effect until six months after the termination of the war unless sooner changed through negotiations between the Association and the General Agents (such agree-

1810 *Plaintiff's Exhibit 9.*

ment to be subject to approval by the War Shipping Administration).

NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION

By S. J. HOGAN
President

By ED. L. ROGERS

Edw. L. Rodgers, Representative
1811 Atlantic Coast District. S.J.H.

By D. J. HUESTON

D. J. Hueston, Representative
Gulf Coast District. S.J.H.

By R. MERIWETHER

R. Meriwether, Representative
Pacific Coast District. S.J.H.

Witness WM. D. HOLMES

1812 COSMOPOLITAN SHIPPING COMPANY, INC.,
AS GENERAL AGENT FOR THE WAR
SHIPPING ADMINISTRATION.

By (Name Illegible)

Witness (Name Illegible)

PARTICULARS OF ENGAGEMENT

WAIVER

AMERSIG

YOU ARE BEING EMPLOYED BY THE UNITED STATES

Reference No.	Name	Birthplace (If foreign-born, but naturalized, insert NAT. in parenthesis after country of birth)	Date of Birth	Height Ft.	Height In.	Race or Color	Number of Continuous Discharge Book or Certificate of Identification	Serial Number of License or Certificate	In What Capacity	Wages per Month[1]		Social Security No.	Place and Date of Signing This Agreement: Place	Place and Date of Signing This Agreement: Date	Time at Which To Be on Board	Monthly Allotments: Amount	Monthly Allotments: Payable to—
													Ny	July	1945		
								H				399-05				100	same
1	George Carter Leonard	Wisc	3/19/17	6	-	wh	295520	11243	Ch Mate	254	-	8859		26	19	200	Bank
												342-01					
X 2	Henry Alexander Clark	Ill	2/2/09	5	8	W	315189	30446	2nd "	220	-	3690		23	19	200	wife
								H				486-22					
X 3	Thomas Vellinger Brown	Mo.	4/4/25	5	8		043777	10711	2nd "	202	-	6071		23	19		
								E	1st			394-16					
4	Carl Paul Albinger	Wis	2/5/03	6	5		319769	400826	Radio Op	187	50	0028		23	19	400	mother
								E	2nd			134-17		7/	7/		
5	Royal Lyman Emch	Nyc	5-30-18	5	9		387228	443153	Radio	165	-	8716		28	28	153	Bank
								A				294-14					
6	Patrick Edward Napier	Ky	9/12/25	5	10	W	440836	55339	Jap Clk M	175	-	7924		23	19	165	mother
								A 84737				126-18					
7	Raphael Peter Connor	Ap. Md	2/2/23	6	1	Ok	359412	B 148480	Baker	110	50	2569		25	24	1	
								A 127194				530-22					
8	Albert Edsel Shaver	Iowa	9/23/23	5	9	W	444659	B 226876	AB Mach	100	-	9462		29	24	100	father
								A 12348				342-16				50	sister
9	Richard Philip Ryan	Ill	8/23/23	5	7	W	496233	B 223069	AB	100	-	5367		23	19	100	mother
								B 95027				547-26					
10	Seamus Casavia	Ny	11/1/14	5	9	✓	74227	B 173712	✓	100	-	8411			19	50	mother
								A 128082				383-03					
11	Hugh Wesley Crawford	Iowa	6/3/20	5	11	✓	475120	B 201433	✓	100	-	7067		24	24	100	wife
		Nat						A 84407				108-20					
12	Frank E Swygert	Eng	5-10-00	5	11	✓	3233 R	B 147994	✓	100	-	9831		25	24	100	Bank
								A 5319				155-17					
13	David Helfman	Pa	2-5-02	5	10		237987	B 14288	✓	100	-	6147		25	24		
								A 167298				386-16					
14	Edward Chester Henry	Mich	11-13-25	5	7	✓	8700	B 286250	✓	100	-	3576		25	25	50	Father
								E				628-14					
15	Raymond Matthews	Mass	2/28/25	5	6	W	378097	650751	OS	82	50	2506		24	24	50	father
								E 40332				231-07					
16	[illegible]		9-1-2	2	12	✓	405219	B 224472	✓	82	50	4249		25	24	75	mother
								E				116-17					
17	Oscar Andrews	(R) (nat)	9-7-20	5	11	✓	52-99	543383	✓	82	50	6783		28	28		
								C				101-07					
18	Halvor O. Myaere	Norway	10/1/85	5	8	W	60118	18894	Ch Engr	384	-	5123		23	23	300	wife
								A		2nd (ACTING 1st)		756-01					
19	Boyd Henry Perkins	NM	5-17-19	5	11	W	3-390	3249	Asst Engr	254	-	7020		28	28	153	wife
								A	2nd			067-10				100	sister
20	Robert A. McAllister	NJ	7/16/20	5	11	W	222774	20160	✓	220	-	5412		23	20	200	wife
									3rd			234-28					
21	Kenneth Wayne Fennaty	Ohio	5/30/19	5	6	✓	398274	137114	✓	202	-	8348		23	20	190	Mother
								C				054-10					
22	George Willis Lucas	Ill	1/7/17	6	1	✓	215283	103559	Jr Engr	187	50	2226		24	20	75	father
								C				284-07					
23	Frederick A. Berry	Ohio	4/12/18	6	3	Blk	389150	121059	Ck Engr	117	50	6368		23	20	110	Mother
		Nat						C 87471				077-14					
24	Jose Ochoa	Argentine	4/17/23	5	5	Brn	100639	B 132276	Oiler	110	-	3692		✓	19		
								C				144-14				50	same
25	William Bates McLeod	Fla	7/3/19	5	10	Neb	531075	155698	✓	110	-	0429		24	24	100	wife
								C				420-09					
26	George Thompson	LA	12-23-23	5	7	Col	478243	63145	✓	110	-	0966		28	19	50	mother
								C 150391				155-14					
27	John Bydowski	Ny	2/8/21	5	6	W	441293	B 219379	Fireman	110	-	8555		23	19	90	wife
								C 20081				235-18					
28	Theodore Ralph Poe	W Va	8/14/23	5	8	✓	381357	170365	✓	110	-	9270		✓	19	100	mother
								C				086-16					
29	Jose Meira	Spain	12/1/96	5	5	Blk	68105	220	✓	110	-	4031		23	19		
								E				372-20					
30	Percy Dwyer Kirby Jr	Ky	12/3/26	5	10	W	582145	667659	Wiper	87	50	3079		23	20		
								C				245-14					
31	Ralph Edward Fatalo	Ny	5/31/22	5	7	C	472814	426797	✓	87	50	8659			20		
								E				463-26					
32	Harold Charles Carothers	Texas	1/15/22	5	11	W	357923	428891	Ch Steward	147	50	7056			19	130	wife
								E				079-20					
33	Tom Kim Fun	China	8/14/00	5	2	Yel	388080	448599	Ch Cook	132	50	1345		25	19		

[1] Enter rate per month and rate per hour for overtime, as both items constitute wages.

16—8419-6

PARTICULARS OF DISCHARGE — RELEASE

Address of Wife or Next of Kin	Shipping Commissioner's Signature or Initials	Place, Date, and Cause of Leaving Ship or of Death: Place	Date	Cause	Time of Service: M	D	Wages Earned: Regular Wage	Overtime	Total	Deductions	Balance of Wages Paid on Discharge	Date Wages Paid and Release Signed	Attestation of Shipping Commissioner	Reference No.
mo- Mrs. Lena Petta 133 Degraw St Jackson Miss		New York	11/29/44	MC	12	11			6540 99	465 71	1682 28	8/3/44		1
wife- Retta 908 48th St Chicago Ill.					12	11			5737 05	3982 85	1754 20			2
[illegible] 923 Lemon Ave Imperial Beach					12	11			5441 50	2497 22	2944 28			3
mo- Almeda 459 Washington St West Sand Lake		Bendix	2/20/46	Hospt.	12	11			2318 67	1676 40	642 27			4
Carl 100 Mooney ave 2a Syracuse Ny mo- Virginia 1209 Broadway Gary Ind		N	1/6/1944	MC	12	8			2067 67 1427 67	1941 00 1323 59	126 67 103 28	8/2/44		5
mo- Signe, Lacuba, Honduras					12	11			3655 64	3034 23	621 41			6
fa James P 18 N Pinney St Julia Alba mo- Leona 4912 N York Blvd Chicago Ill.		FREMANTLE W. Australia	2/17/46	Hospt.	12	6			3031 59 1603 91	1768 27 1429 32	1263 32 174 39			7 8
wife- Angelina 450 Pine St Alden Ny		N	1/6/1944	MC	12	11			3114 24	2776 73	437 51	8/3/44		9
					12	11			1784 53 1118 25	1771 99 709 65	12 54 408 60			10
wife- Florence 12507 Strathelly St Detroit Mich				DEPOTED To	DS	3/19/46			862 92 2062 84	813 14 1537 78	49 18 525 06	8/2	Under protest Hugh Wesley Crawford	11
Margret Brewster wife Sue RFD #11 Fairfield Conn					12	6			3100 31	2358 07	742 09	8/3/44		12
[illegible] Wilkins 5851 Lemon St Detroit Mich					18	6			2980 44	1747 22	1233 22			13
fa- Alvin York St Dartmouth Mass		Ny	7/26/46	MC	3	7			2360	417	1943	8/2/44		14
			1/6/1944		12	6			2301 98	1690 99	610 99			15
Daisy E Mulone Roselgundo Mo. Roanoke Va wife Anna 198 Brown St Brooklyn Ny					12	6			2540 17 1741 61	2016 53 235 00	523 64 1506 61	8/3/44		16
wife- Marie 926 82nd St Brklyn Ny					12	6			1118 25	568 44	549 81			17
Virginia Box 85 Chester Ny					12	6			2468 67 3559 56	1984 73 3078 25	503 92 764 61			18
wife- Ann 933 Bushy St Sandusky Ohio					12	6			1720 33 365 30 4159 93	698 44 365 30 2734 55	1043 89 1425 38			19
mo- Pearl Patriot Ohio		TSINGTAO CHINA	12/1/45	Hospital	12	2		ADVANCED to 2nd	2032 39	1734 06	307 33	9/4/46	Under protest Robert A. McClintock	20
		N	1/6/1946	MC	12	10			ENGINEER 516 47 788 13 2587 04	297 15 609 70 2772 90	12/1/45 219 32 178 43 106 14	8/3/46	N. W. Lumas	21
fa- William 511 Bergen St Lakeyn Ny mo- Mary 2525 W 7th St Coney Island		Portland	Aug 28	Left	22	8	45		181 45	1 1/2	81	Aug 46	George W Lucas	22
		N	1/6/1946		12	10			3673 90	2791 35	882 55	8/3/44	Frederick G. Berg	23
niece- Conquella Cook 179 Atlantic Ave Brklyn Ny				MC	12	11			1301 45 1944 27	851 05 304 30	449 40 1640 97		José Ochoa	24
niece- Mary 154 Temple St Paterson N J					12	6			3294 01	2412 60	881 41		William B. McLeod	25
Louvetta 527 N. Joachim St mo Mobile Ala					12	11			3301 43	2327 59	973 84		George Wagner	26
niece- Dorothy 4236 Cherokee Ave Phila Pa. mo- Hattie Box 197 Sandy W. Va.					12	11			3387 27	1991 26	1395 91		John Brodowski	27
fa- Carlos Lynn wife Lenna Lynn mo- Martha 106 Sycamore Apts Pittsburgh Pa aunt Ruth Gaye 80 Edgecomb Ave Apt 6 Yonkers N.Y.		Left in hospital Shanghai, China	11/1/45	Hospital	12	11			3493 83	2356 41	1037 42			28
					2	12	264 00	made	Bal. Due Ch	Voucher to Master	Wages Paid by Consul of the United States of America at Shanghai, China			
					1	14	127 33	1 day	921 90	256 00	665 90			29
		Northampton Australia	FEB 7-46	SEE ATTACHED FORM	Promoted B 5	to 87 41	DECK TO BE ADJUSTED	ENGINEER	1345 48	141 60	603 68	FEB 8-46	George Douglas Hill	
		Northampton Australia	FEB 7-46	SEE ATTACHED FORM	Promoted E 5	to 87 41	FIREMAN - WATER TENDER TO BE ADJUSTED		1394 48	878 47	515 81	FEB 8-46	Ralph Clement Patil	
Box Sea Serv - 86 Schenectady St - Brklyn N.Y.		N	1/6/1946	MC	12	11			4192 63	2616 57	1574 06	8/3/44	H C Cardenas	32
					12	11			3586 56	744 60	2841 96		Tan Kim Pun	33

29/10 Jose Oleira

PARTICULARS OF ENGAGEMENT

Engagement No.	YOU ARE BEING EMPLOYED AS A SEAMAN BY THE UNITED STATES	Birthplace (If foreign-born, but naturalized, insert NAT. in parenthesis after country of birth)	Date of Birth	Height Ft.	Height In.	Race or Color	Number of Continuous Discharge Book or Certificate of Identification	Serial Number of License or Certificate	In What Capacity	Wages per Month[1]		Social Security No.	Place and Date of Signing This Agreement: Place	Place and Date of Signing This Agreement: Date	Time at Which To Be on Board	Monthly Allotments: Amount	Monthly Allotments: Payable to—
	Stanley							E				113-03		July	1945		
34	Donald S. Balash	NY	1/19/19	5	11	W	2460651	163745	2nd C&B	112	50	2753		25	24	200	[illegible]
35	See Thiny Chew	China	8/15/11	5	7	Ye	58826 D1	E 1635x0	Asst Cook	117	50	061-22 1739		29	19		
36	Robert Edward Blake	N.J	7/8/18	5	10	C	459567	E 738492	Mess	87	50	140-09 1517		23	20		
37	CAEWCAN TAN	China	8/14/97	5	6	Y	379032	E 446918	✓	87	50	028-20 2346		23	19		
38	Foo Kak Jang	✓	7/5/10	5	4	✓	358715	E 449837	✓	87	50	051-20 7474		23	19		
39	Harold R Wills	Penn	3-7-23	5	8	✓	101974	E 575219	Utility	87	50	143-32 8345		24	24		
40	Domenic Cirella	NY	5/27/26	5	9	DK	520110 D-1	E 538749	✓	87	50	115-18 7019		27	26	80	wife
41	Benito Hernandez	P.R	4/25/18	5	4	W	45586	E 378889	—	87	50	101-18 8305		30	30	60	wife
42	Robert Anderson	Ala.	8/3/11	5	10	Col	7978 ✓	A 93018 D-2 A 116409	A.B.		00	066-16 4014		30	30	90	Wife
43	William Hilbert Pedretti	Ill	4/13/13	5	11	W	49380	E 511461	2nd C&B	112	50	494-09 3237		30	30	100	wife
44	Arnold Ewing Winzeried	Ill.	8/29/27	6	0	W.	681628	E 724375	Utility	87	50	356-18 2994	Alsea	31	31	—	—
45	Morgan P. Kavanaugh	N.J	5/13/25	5	10	W.	44a355	C 127263	Jr. Eng.	137	50	137-18-2967	Colombo Ceylon	9/3/45	9/3/45		
46	Norton B. Jones	Pennsylvania	APR 4-1919	5	7	W	U.S. PASSPORT NO. 354 ISSUED AT MELBOURNE AUSTRALIA		Wiper	132	50	187-01-5042	Melbourne Australia	JAN 16-46	JAN 16-1946		
47	Marshall W. Bauman	TEXAS	JUNE 1-18	5	11	W	2359362	E	WIPER	132	50		MELBOURNE AUSTRALIA	JAN. 25-1946	JAN. 25-1946		
48	Bernard Streifel	NORTH DAKOTA	SEPT 16-22	5	11	W	2695659		WIPER	132	50	544-30 2168	MELBOURNE AUSTRALIA	FEB 8-46	FEB 8-46		
49	Lewis A Peterson	CALIFORNIA	DEC 22-33	6	3	W	18762	E 83636	WIPER	132	50	543-14 0143	do	FEB 8-46	FEB 8-46		
50	Walton Lundeman	NEW JERSEY	DEC 23-05	5	10	W.	2120112 D3	E	WIPER	132	50	450-28 2937	do	FEB 8-46	FEB 8-46		
51	William Knight	Ireland (British Isles)	5/15/03	5	6	W	666192	C 208909	FA/Wt.	155	00	—	SAN FERNANDO LA. U.-P.I.	MAY 10/46	MAY 10/46	—	
52	Leonardo Dela Concalla	China	9/23/17	5	10	W	—	—	Messmen	132	50	—	"	May 24	May 24		
53	George Leonard Ashworth Jr.	Minn.	7/27/22	5	8	W	2.332363	A 35449	2nd Eng.	265	00	474-18 2686	Subic Bay Philippines	May 31	May 31		
54	John J. Pszanosky	Pa	9-7-24	5	7	W			O. S.	87	50		Manila PI	6/4/46	6/4/46		
55																	
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[1] Enter rate per month and rate per hour for overtime, as both items constitute wages.

16—8419-3

PARTICULARS OF DISCHARGE — RELEASE

Address of Wife or Next of Kin	Shipping Commissioner's Signature or Official Number	Place, Date, and Cause of Leaving Ship or of Death: Place	Date	Cause	Time of Service: M	D	Wages Earned: Regular Wage	Overtime	Total	Deductions	Balance of Wages Paid on Discharge	Date Wages Paid and Release Signed	We, the undersigned seamen, do hereby, each one for himself by our signatures herewith given in consideration of settlements made before the shipping commissioner, release the Master and owners from all claims for wages in respect of this voyage or employment, and I, the Master, do also release each of the undersigned seamen from all claims, in consideration of this release signed by them.	Attestation of Shipping Commissioner	Reference No.
W. Gene - Patterson St. Bernard La. Bro Chas Dick - 236 Schmeichardt Bldg. Akron O. 793 Vezhall Ave Elelyn NJ		NY	7/30/46	MC	— 6			26	26 90	25 94	26 96	7/30		Donald Stanley Bolan	34
			11/8/46	Repatriated	12 11			Utility	12/7/45	ADVANCED	11/24/45				
				Permanent	To			Rec'd. Cook	12/29/45	56 94	34 27	14 63		See Thing Chew	35
Wong Ugeld - Foo Kain Yen - 86 Schmeichsen St. Belleyng Annia 176 Cook St.					12 10				2797 82	1392 60	1607 22				36
					12 11				2915 52	644 88	2270 64			CHEW CHAN TAN	37
					12 11				2897 97	644 21	2253 76			Frokk Jr	38
Mrs. Waterbury Conn 278 Kingsley St Waterbury Conn		PRESUMED DEAD	To	A.E.	12/7/45				1581 01	1547 51	33 50				
					12 4				205 25	200 00	5 25			A R Wills	39
									1078 26	16 76	1062 00				
		MANILA P.I.	4/29/46	Hospt	12 4				577 50	445 -8	132 42	8/6/46			
									247 63		247 63	7/		Dominick Cas	
									1415 08	966 57	448 48				
	NY		7/31	Hospt	— 2				5 83	— 18	5 65	7/31		Benito Ferrer	41
			1/29/46	MC	12 —				2922 81	2132 04	790 77	8/6/46		Joseph Jackson	42
					12 —				3457 74	2218 33	1239 41			William D. Sebastian	43
					11 29				3923 27	1385 90	1537 37			Arnold E. Wenzel	44
		PROMOTED TO 4th Asst. Eng. 12/1/45			10 27				TO Second Eng. 4/18/46					Maggie O. Kavanagh	45
									4362 43	2419 01	1943 42	7/	OTHER		
		PROMOTED TO Refrig Engineer			6 14				1493 03	583 38	910 65			Norton Pa Inc.	46
		MELBOURNE AUSTRALIA	FEB 7-46	SEE ATTACHED FORM	D 14	61	83	NONE	61 83	32 77	29 06	FEB 8-46		Marshall W. Bauman	47
			7/29/46	MC	6 5				1183 30	503 55	680 37	8/12/46		Bernard Streifel	48
					22				1131 90	619 41	512 49			Lewis A. Peterson	49
		Hong Kong	4/29/46	A.E.	5 22				563 75	237 24	326 51			Walter Sundermann	50
			11/29/46	MC	5 22				649 10	93 22	555 88			William Dwight	51
					2 20				527 25	204 23	323 02			Leonard Bela Bartell	52
					2 6				635 50	206 32	429 51			George P. Cutkomp Jr.	53
					1 26				410 45	186 78	223 67			John J. Rezanosky	54
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Wife: Flora.
(m) Anna - 6224 - Eldridge Street - Chicago - Illinois
(M) Mrs. Mary Thom 58 Sixth Ave. Bay Branch 3 Wife. Worthy grows. Rutherford
63. Lydia St. E. Brunswick
MO. MRS. BERNICE BAUMAN. 1004 TRUXILLO - APT. J. HOUSTON
MO- MAGDALENE. HILLSVIEW SOUTH DAKOTA
WI- MARY- ELDORA D.O. WANGERATTA. Vic. AUSTRALIA
BRO. ROY. 349 KINGSLAND AVE. LYNDHURST. NJ.
5) Mrs. James Johnston - 144 Regent Rd. Empworth. Pitts. Pa
F) B.P. Gonsall - 31 West Chapel Preston Lancs. England
M) Mrs. H.P. Anderson - Cass Lake - Minn.

Defendant's Exhibit G.

GAA 4-4-42 Contract WSA 3165

SERVICE AGREEMENT FOR VESSELS OF WHICH THE WAR SHIPPING ADMINISTRATION IS OWNER OR OWNER PRO HAC VICE

THIS AGREEMENT, made as of October 12, 1942, between the UNITED STATES OF AMERICA (herein called the "United States") acting by and through the Administrator, War Shipping Administration, and COSMOPOLITAN SHIPPING COMPANY, INC., a corporation organized and existing under the laws of Delaware, and having its principal place of business at New York, New York, (herein called the "General Agent").

WITNESSETH:

That in consideration of the reciprocal undertakings and promises of the parties herein expressed:

ARTICLE 1. The United States appoints the General Agent as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it by the United States from time to time.

ARTICLE 2. The General Agent accepts the appointment and undertakes and promises so to manage and conduct the business for the United States, in accordance with such directions, orders, or regulations as the latter has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided, of such vessels as have been or may be by the United States assigned to and accepted by the General Agent for that purpose.

ARTICLE 3A. To the best of its ability, the General Agent shall for the account of the United States:

(a) Maintain the vessels in such trade or service as the United States may direct, subject to its orders

1825

as to voyages, cargoes, priorities of cargoes, charters, rates of freight and charges, and as to all matters connected with the use of the vessels; or in the absence of such orders, the General Agent shall follow reasonable commercial practices;

(b) Collect all moneys due the United States under this Agreement and deposit, remit, or disburse the same in accordance with such regulations as the United States may prescribe from time to time, and account to the United States for all moneys collected or disbursed by it or its agents;

1826

(c) Equip, victual, supply and maintain the vessels, subject to such directions, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe;

(d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder.

1827

1828 *Defendant's Exhibit G.*

(e) Issue or cause to be issued to shippers customary freight contracts and Bills of Lading. Unless the United States shall otherwise instruct, such Bills of Lading shall contain all exemptions and stipulations usual to the particular trade or service in which the vessels may be engaged, and reserve a lien upon all cargoes for the payment of freight, primage charges, dead freight, demurrage, forwarding charges, advance charges for carriage to port of shipment, for contributions in general average and
1829 special charges on cargo and for all fines or penalties which the vessels or cargoes may incur by reason of illegal, incorrect or insufficient marking or addressing of packages or description of their contents. After a uniform Bill of Lading shall have been adopted by the United States, such Bill of Lading shall be used in all cases as soon as practicable after receipt thereof by the General Agent, with such modifications as shall be necessary for the particular trades in which the vessels hereunder shall from time to time be employed. Pending the issuance of such uniform Bill of Lading, the General Agent may continue to use its usual commercial form of Bill of
1830 Lading.

As soon as practicable after April 1, 1942, all Bills of Lading shall be issued by the General Agent or its agents as agent for the Master and the signature clause may provide substantially that the General Agent makes no warranty or representation as to the authority of the United States or the Master to enter into the agreement, and that the General Agent assumes no liability with respect to the goods described therein or the transportation thereof.

ARTICLE 3B. The General Agent agrees, without prejudice to its rights under the provisions of Articles 8 and 16 hereof, to:

Defendant's Exhibit G. 1831

(a). Perform the duties required to be performed by it hereunder in an economical and efficient manner, and exercise due diligence to protect and safeguard the interests of the United States in all respects and to avoid loss and damage of every nature to the United States;

(b) Exercise due diligence to see that all Bills of Lading are properly issued, all wharf receipts for freight are non-negotiable, and, where required, a freight contract or permit is issued for each shipment; 1832

(c) Furnish and maintain during the period of this Agreement, at its own expense, a bond with sufficient surety, in such amount as the United States shall determine, such bond to be approved by the United States as to both sufficiency of surety or sureties and form, and to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the General Agent contained in this Agreement, including, without limitation of the foregoing, the condition faithfully to account to the United States for all funds collected and disbursed and funds and property received by 1833
the General Agent or its agents. The General Agent may, in lieu of furnishing such bond, pledge direct or fully guaranteed obligations of the United States of America of the face value of the penalty of the bond under an agreement satisfactory in form to the United States;

(d) Without the consent of the United States, not sell, assign or transfer, either directly or indirectly or through any reorganization, merger or consolidation, this agreement or any interest therein, nor make any agreement or arrangement whereby

Defendant's Exhibit A.

(Photo-offset of Shipping Articles for SS Edward B. Haines, Voyage 7, dated New York, New York, July 23, 1945.)

Defendant's Exhibit C.

1819

1, Dec. 1945

McAllister R. A. 1st Lt. of SS Haines has been admitted to Div. Field Hosp. #1 6 Mar. Div. for diagnosis and treatment. It is not advisable that he be released at this time. Diagnosis has not been established.

D. J. Giorgio
Lt. Cdr., MCUSN

1820

Defendant's Exhibit D.

(Rough Engine Log, SS Edward B. Haines.)
(Printing omitted pursuant to stipulation.)

Defendant's Exhibit F.

July 18, 1946

Dear Sir:

1821

I thank you once again for your consideration and the rapid results shown my request. You have been more than fair, considering you are a stranger and work for a business establishment. You will always have my respect and appreciation for the thoughtfullness you have shown me.

Respectfully Yours,

Robert A. McAllister

the service to be performed hereunder is to be performed by any other person, whether an agent or otherwise, except as provided in Article 6 hereof.

ARTICLE 4. (a) The General Agent and, to the extent required by the United States, every related or affiliated company or holding company of the General Agent, authorized as provided in Article 13 hereof, to render any service or to furnish any stores, supplies, equipment, provisions, materials, or facilities which are for the account of the United States under the terms of this Agreement,
1835 shall (1) keep its books, records and accounts relating to the management, operation, conduct of the business of and maintenance of the vessels covered by this Agreement in such form and under such regulations as may be prescribed by the United States; and (2) file, upon notice from the United States, balance sheets, profit and loss statements, and such other statements of operation, special reports, memoranda of any facts and transactions, which, in the opinion of the United States, affect the results in, the performance of, or transactions or operations under this Agreement.

(b) The United States is hereby authorized to examine
1836 and audit the books, records and accounts of all persons referred to above in this Article whenever it may deem it necessary or desirable.

(c) Upon the willful failure or willful refusal of any person described in this Article to comply with the provi-
1 sions of this Article, the United States may rescind this Agreement.

ARTICLE 5. At least once a month the United States shall pay to the General Agent as full compensation for the General Agent's services hereunder, such fair and reasonable amount as the Administrator, War Shipping Administration, shall from time to time determine: Pro-

1837

vided, That with respect to vessels allocated before February 25, 1942, compensation shall not be less than the amount of earnings which the General Agent would have been permitted to earn under any applicable previously existing bareboat charters, preference agreements, commitments, rules or regulations of the United States Maritime Commission until the earliest termination date permissible thereunder as of March 22, 1942. Such compensation shall be deemed to cover, but without limitation, the General Agent's administrative and general expense (as presently itemized in General Order No. 22 of the United States

1838

Maritime Commission), advertising expense, taxes (other than taxes for which the General Agent is reimbursed under Article 7 hereof), and any other expenses which are not directly and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder.

ARTICLE 6. The General Agent shall exercise due diligence in the selection of agents. Such agents shall be subject to disapproval by the United States and any agency agreement shall be terminated by the General Agent whenever the United States shall so direct. Any compensation payable by the General Agent to its agents for services

1839

rendered in connection with the vessels assigned hereunder shall be subject to approval by the United States. In the event that any of the vessels covered by this Agreement are operated in a service in which an American citizen maintained a berth operation with American flag vessels on September 1, 1939, the General Agent, upon request of the United States, will assign such vessels to such berth operators as agents as may be appropriate under form of agreement prescribed by the United States. Agency fees or equivalent allowances for branch offices in accordance with schedules approved by the United States will be reimbursable under Article 7 hereof.

1840 *Defendant's Exhibit G.*

ARTICLE 7. The United States shall reimburse the General Agent at stated intervals determined by the United States for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder, *excepting* general and administrative expense (as presently itemized in General Order No. 22 of the United States Maritime Commission), advertising expense, taxes (other than sales and similar taxes or foreign taxes of any kind to the extent determined by the United States to be classifiable as voyage expenses hereunder) and any other ex-
1841 penses which are not directly and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder. The General Agent shall be reimbursed for sales and similar taxes or foreign taxes of any kind to the extent determined by the United States to be classifiable as voyage expenses hereunder if the General Agent shall have used due diligence to secure immunity from such taxation. To the extent not recovered from insurance, the United States shall also reimburse the General Agent for all crew expenditures (accruing during the term hereof) in connection with the vessels hereunder, including, without limitation, all disbursements for or on
1842 account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, maintenance, cure, vacation allowances, damages or compensation for death or personal injury or illness, and insurance premiums, required to be paid by law, custom, or by the terms of the ship's articles or labor agreements, or by action of the Maritime War Emergency Board, any payments made by the General Agent to a pension fund in accordance with a pension plan in effect on the effective date of this Agreement with respect to the officers and members of the crew of said vessels who are entitled to benefits under such plan, on the effective date of this Agreement, for the amount of any Social Security

taxes which the General Agent is or may be required to pay on behalf of the officers and crew of said vessels as agent or otherwise. The United States may disallow, in whole or in part, as it may deem appropriate, and deny reimbursement for, expenses which are found to have been made in willful contravention of any outstanding instructions or which were clearly improvident or excessive. 1843

Any moneys advanced to bonded persons by the General Agent for ship disbursements which are lost by reason of a casualty to the Vessel on which the money so advanced is carried shall in the event of such loss be considered an expense of the General Agent, subject to reimbursement as is in this ARTICLE 7 provided. 1844

The United States may advance moneys to the General Agent to provide for disbursements hereunder in accordance with such regulations or conditions as the United States may from time to time prescribe.

ARTICLE 8. The United States shall, without cost or expense to the General Agent, procure or provide insurance against all insurable risks of whatsoever nature or kind relating to the vessels assigned hereunder (which insurance shall include the General Agent and the vessel personnel as assureds) including, but without limitation, marine, war and P. & I. risks, and all other risks or liabilities for breach of statute and for damage caused to other vessels, persons or property, and shall defend, indemnify and save harmless the General Agent against and from any and all loss, liability, damage and expense (including costs of court and reasonable attorneys' fees) on account of such risks and liabilities, to the extent not covered or not fully covered by insurance. The General Agent shall furnish reports and information and comply fully with all instructions that may be issued with regard to all salvage claims, damages, losses or other claims. Neither the United States nor the insurance underwriters 1845

1846

shall have any right of subrogation against the General Agent with respect to such risks. The United States may assume any of the foregoing risks except those relating to P. & I. risks and collision liabilities. At all times during the period of this Agreement, the United States shall at its own expense provide and pay for insurance with respect to each vessel hereunder against protection and indemnity marine and war risks, and collision liabilities without limit as to liability as to the amount of any claim or the aggregate of any claims thereunder. The United States at its election may write all or any such insurance, including that against P. and I. collision liabilities, in its own fund, pursuant to a duly executed policy or policies. Neither the United States nor the insurance underwriters shall have any right of subrogation against the General Agent with respect to any of the foregoing risks. All insurance hereunder shall cover both the United States and the General Agent.

1847

ARTICLE 9. In the event of general average involving vessels assigned to the General Agent under this Agreement, the General Agent shall comply fully with all instructions issued by the United States in that connection including instructions as the appointment of adjuster, obtaining general average security and asserting liens for that purpose unless otherwise instructed, and supplying the adjuster with all disbursements accounts, documents and data required in the adjustment, statement and settlement of the general average. Reasonable compensation for and general allowances to the General Agent in such cases shall be in accordance with directions, orders or regulations of the United States.

1848

ARTICLE 10. Salvage claims for services rendered to vessels other than vessels owned or controlled by the United States shall be handled by, and be under the con-

trol of, the United States. Salvage awards for services rendered to other vessels owned or controlled by the United States including the vessels hereunder shall be made by the United States. The General Agent shall furnish the United States with full reports and information on all salvage services rendered.

ARTICLE 11. (a) The United States shall have the right to terminate this Agreement at any time as to any and all vessels assigned to the General Agent and to assume control forthwith of any and all said vessels upon fifteen (15) days' written or telegraphic notice. 1850

(b) Upon giving to the United States thirty (30) days' written or telegraphic notice, the General Agent shall have the right to terminate this Agreement, but termination by the General Agent shall not become effective as to any vessel until her arrival and discharge at a continental United States port.

(c) This Agreement may be terminated, modified, or amended at any time by mutual consent.

ARTICLE 12. In case of termination of this Agreement, whether upon expiration of the stated period hereof or otherwise, all vessels and other property of whatsoever kind then in the custody of the General Agent pursuant to this Agreement, shall be immediately turned over to the United States, at times and places to be fixed by the United States, and the United States may collect directly, or by such agent or agents as it may appoint, all freight moneys or other debts remaining unpaid: Provided, That the General Agent shall, if required by the United States, adjust, settle and liquidate the current business of the vessels. Nothwithstanding the foregoing provisions, when the United States shall so direct, the General Agent shall complete the business of voyages commenced prior to the 1851

date as of which the Agreement shall be terminated, and, if directed by the United States and subject to any instructions issued by the United States with respect thereto, the General Agent shall continue to book cargo for the vessels for the next voyages after the termination of this Agreement. No such termination of this Agreement shall relieve either party of liability to the other in respect of matters arising prior to the date of such termination or of any obligation hereunder to indemnify the other party in respect of any claim or demand thereafter asserted,
1853 arising out of any matter done or omitted prior to the date of such termination.

ARTICLE 13. Agreements or arrangements with any interested or related company to render any service or to furnish any stores, supplies, equipment, materials, repairs, or facilities hereunder shall be submitted to the United States for approval as to employment. Unless and until such agreements or arrangements have been approved by the United States, compensation paid to any interested or related company shall be subject to review and readjustment by the United States. In connection with such review and readjustment, the United States may deny reimburse-
1854 ment hereunder of any portion of such compensation which it deems to be in excess of fair and reasonable compensation. The United States may also deny reimbursement, in whole or in part, of compensation under any arrangement or agreement with an interested or related company which it deems to be exorbitant, extortionate or fraudulent. The term "interested company" shall mean any person, firm, or corporation in which the General Agent, or any related company of the General Agent, or any officer or director of the General Agent, or any employee of the General Agent who is charged with executive or supervisory duties, or any member of the immediate family of any such officer, director or employee, or any officer or director of any re-

1855

lated company of the General Agent or any member of the immediate family of an officer or director of any related company of the General Agent, owns any substantial pecuniary interest directly or indirectly. The term "related company", used to indicate a relationship with the General Agent for the purposes of this Article only, shall include any person or concern that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the General Agent. The term "control" (including the terms "controlled by" and "under common control with") as used herein means the 1856
possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of the General Agent (or related company), whether through ownership of voting securities, by contract, or otherwise.

ARTICLE 14. The General Agent shall, unless otherwise instructed, subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States, arrange for the repair of the vessels, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, and including maintenance and voyage repairs and replacements, for the account of the United States, as may be necessary 1857
to maintain the vessels in a thoroughly efficient state of repair and condition. The General Agent shall exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels, and so advise the United States from time to time, in order that the United States may satisfy itself that the vessels are being properly maintained, and shall cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable.

ARTICLE 15. The United States shall, when it may legally do so, have the advantage of any existing, or future,

contracts of the General Agent for the purchase or rental of materials, fuel, supplies, facilities, services, or equipment, if this may be done without unreasonably interfering with the requirements of other vessels owned or operated by the General Agent.

ARTICLE 16. (a) The United States shall indemnify, and hold harmless and defend the General Agent against any and all claims and demands (including costs and resonable attorneys' fees in defending such claim or demand, whether or not the claim or demand be found to be valid)
1859 of whatsoever kind or nature and by whomsoever asserted for injury to persons or property arising out of or in any way connected with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder, including but not limited to any and all claims and demands by passengers, troops, gun crews, crew members, shippers, third persons, or other vessels, and including but not limited to claims for damages for injury to or loss of property, cargo or personal effects, claims for damages for personal injury or loss of life, and claims for maintenance and cure.

(b) In view of the extraordinary wartime conditions
1860 under which vessels will be operated hereunder, the General Agent shall be under no responsibility or liability to the United States for loss or damage to the vessels arising out of any error of judgment or any negligence on the part of any of the General Agent's officers, agents, employees, or otherwise. However, the General Agent may be held liable for loss or damage not covered by insurance or assumed by the United States as required under Article 8 of this Agreement, if such loss or damage is directly and primarily caused by willful misconduct of principal supervisory shoreside personnel or by gross negligence of the General Agent in the procurement of licensed officers or

1861

in the selection of principal supervisory shoreside personnel.

(c) In the event that the General Agent shall perform any stevedoring, terminal, ship repair or similar service for the vessels hereunder at commercial rates, the General Agent shall have all the obligations and responsibilities of the person performing such services under the standard or other approved form of contract with the United States or, in the absence of such standard or approved form, under usual commercial practice.

1862

(d) The General Agent shall be under no liability to the United States of any kind or nature whatsoever in the event that the General Agent should fail to obtain officers or crews for the operation of the vessels, or fail to arrange for the fitting out, refitting, maintenance or repair of said vessels, or fail to perform any other service hereunder by reason of any labor shortage, dispute or difficulty, or any strike or lockout or any shortage of material or any act of God or peril of the sea or any other cause beyond the control of the General Agent whether or not of the same or similar nature; or shall do or fail to do any act in reliance upon instructions of military or naval authorities.

1863

ARTICLE 17. Wherever and whenever herein any right, power, or authority is granted or given to the United States, such right, power, or authority may be exercised in all cases by the War Shipping Administration or such agent or agents as it may appoint or by its nominee, and the act or acts of such agent or agents or nominee, when taken, shall constitute the act of the United States hereunder. In performing its services hereunder, the General Agent may rely upon the instructions and directions of the Administrator, his officers and responsible employees, or upon the instructions and directions of any person or agency authorized by the Administrator. Wherever prac-

ticable, the General Agent shall request written confirmation of any oral instructions or directions so given.

ARTICLE 18. (a) The General Agent warrants that it has not employed any person to solicit or secure this Agreement upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the United States the right to annul this Agreement or in its discretion to deduct from any amount payable hereunder the amount of such commission, percentage, brokerage or contingent fee.

1865

(b) In any act performed under this Agreement, the General Agent and any subcontractor shall not discriminate against any citizen of the United States on the ground of race, creed, color or national origin.

ARTICLE 19. No person elected or appointed a member of or delegate to Congress or a Resident Commissioner, directly or indirectly, himself or by any other person in trust for him, or for his use or benefit, or on his account shall hold or enjoy this Agreement in whole or in part, except as provided in Section 206, Title 18, U. S. C. The General Agent shall not employ any member of Congress, either with or without compensation, as an attorney, agent, officer or director.

1866

ARTICLE 20. Subject to the provisions of Article 5 hereof, this Agreement is in substitution of and hereby abrogates and replaces the so-called 1¢ Bareboat Charter Agreements relating to the assignment or allocation to the General Agent of the vessels listed on Exhibit A hereto from the dates stated on such Exhibit. Preference Agreements relating to such allocated vessels shall be terminated and abrogated as of the same dates.

All rights and obligations of the parties under said abrogated Bareboat Charter and Preference Agreements

1867

are hereby cancelled and this Agreement is made retroactive to the cancellation dates thereof as stated on Exhibit A hereto. However, the General Agent shall be reimbursed for any expenditure made before the earliest permissible cancellation date after March 22, 1942, under said agreements to the extent that such expenditure would have been considered in computing additional charter hire or freight under such agreements. This Agreement, unless sooner terminated, shall extend until six months after the cessation of hostilities.

1868

In Witness Whereof, the Parties hereto have executed this Agreement in triplicate the day and year first above written.

United States of America,

By: E. S. Land, Administrator
War Shipping Administration

By: /s/ D. F. Houlihan
For the Administrator

Corporate Seal

Cosmopolitan Shipping Company, Inc.

1869

By: /s/ A. F. Mack
Pres.

Attest:

/s/ W. W. Maule
Secretary

Approved as to form:

/s/ Frank J. Zito
Acting Asst. General Counsel
War Shipping Administration

1870 **Defendant's Exhibit H.**

(COPY)

WAR SHIPPING ADMINISTRATION
Washington 25, D. C.

February 12, 1944

Cosmopolitan Shipping Company,
42 Broadway,
New York City, N. Y.

1871 S. S. Edward B. Haines—MCE No. 2612

Gentlemen:

The above vessel has been allocated to your Company under Service Agreement, form GAA (Contract 3165) dated Oct. 12, 1942, for operation as directed by the War Shipping Administration.

This vessel is expected to be ready for delivery by Bethlehem Fairfield Shipyard, Inc., at Baltimore, Md., on March 23, 1944.

It is requested that you contact our District Manager, Mr. J. A. Bouslog at Baltimore, Md., and arrange to take
1872 delivery under the Service Agreement when the vessel is ready.

Marine P. & I. Insurance should be placed by your company in accordance with insurance instructions #2, effective as of the time that the first member of the vessel personnel is placed aboard.

Insurance data sheets are enclosed, which should be filled out in duplicate and forwarded as soon as the information is available to Division of Wartime Insurance, War Shipping Administration, Washington, D. C. This data is required in order that the crew of this vessel may be properly protected against war risks.

Defendant's Motions: To Dismiss Complaint; for Directed Verdict for Defendant; to Set Aside Verdict, and for a New Trial. 1873

You will be advised in due course regarding the placing of certain personnel aboard the vessel prior to delivery.

Yours very truly,

(sgd.) T. J. KRENER,
Mgr. Charters and Agencies Section,
Division of Operations.

Copies for Mr. Hudson, Capt. Kerwin, Mr. Murphy, Mr. Randell. 1874

Defendant's Motions: To Dismiss Complaint; for Directed Verdict for Defendant; to Set Aside Verdict, and for a New Trial.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Sir: 1875

PLEASE TAKE NOTICE that the defendant above named hereby renews its motions made to the Court herein before verdict:

FIRST—That the complaint be dismissed for the reasons, (a) that the defendant was not the employer of the plaintiff at the times mentioned in the complaint, (b) that the defendant had no contractual relationship with the plaintiff at said times and owed the plaintiff no duty in respect of the illness alleged in the complaint, nor in respect of any medical attendance, care or treatment therefor and, (c) that at the close of the plaintiff's case he had failed

1876 *Defendant's Motions: To Dismiss Complaint; for Directed Verdict for Defendant; to Set Aside Verdict, and for a New Trial.*

to introduce evidence sufficient to support the allegations of the complaint.

SECOND: That the Court direct the jury to find a verdict in favor of the defendant upon first cause of action alleged in the complaint, for the reasons above stated and for the reason that the evidence in the record is insufficient to support said alleged first cause of action.

1877 AND PLEASE TAKE FURTHER NOTICE that the defendant hereby moves the Court that in the event neither of said motions be granted;

THIRD—The verdict of the jury upon the first cause of action alleged in the complaint and any judgment entered thereon be set aside because it is (a) contrary to the evidence, (b) contrary to the weight of evidence, (c) not supported by the evidence and (d) grossly excessive, unjust and capricious; and for a new trial.

Dated, New York, N. Y., February 16, 1948.

Yours, etc.,

1878 HORACE M. GRAY,
Attorney for Defendant,
Office & P. O. Address,
42 Broadway,
New York, N. Y.

To:

The CLERK of the United States
District Court For The
Southern District of New York.

BERTRAM J. DEMBO, Esq.,
Attorney for Plaintiff,
220 Broadway,
New York, N. Y.

Notice of Exception. 1879

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Sir:

PLEASE TAKE NOTICE that the plaintiff excepts to the defendant's motion to dismiss the complaint and so forth, on the ground that the moving papers are defective as a matter of law. 1880

Dated, New York, February 16, 1948.

Yours, etc.,

BERTRAM J. DEMBO,
Attorney for Plaintiff,
Office & P. O. Address,
220 Broadway,
Borough of Manhattan,
City of New York. 1881

To:

HORACE M. GRAY, Esq.,
Attorney for Defendant,
42 Broadway,
New York 4, N. Y.

1882 **Notice of Motion to Set Aside Verdict.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Sir:

PLEASE TAKE NOTICE that upon all the pleadings and proceedings heretofore had herein, a motion will be made at the Chambers of the Court before Hon. Alfred C. Coxe,
1883 on the 19th day of February, 1948, at 3:30 o'clock in the afternoon of that day, for an order setting aside the jury's verdict in favor of the defendant on the second cause of action, and for a new trial on said cause of action for maintenance and cure, on the ground that the jury failed to follow the instructions of the Court, which in substance was a directed verdict for the plaintiff, and for such other and further relief as to this Court may seem just and proper.

Dated, New York, February 16, 1948.

1884 Yours, etc.,

BERTRAM J. DEMBO,
Attorney for Plaintiff,
Office & P. O. Address,
220 Broadway,
Borough of Manhattan,
City of New York.

To:

HORACE M. GRAY, Esq.,
Attorney for Defendant,
42 Broadway,
New York 4, N. Y.

Notice of Motion to Dismiss Complaint, to Set Aside Verdict, and for a New Trial.

1885

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Sir:

PLEASE TAKE NOTICE that upon all the pleadings and proceedings heretofore had, and papers filed herein, the defendant will move before this Court at the chambers of Honorable Alfred C. Coxe, U. S. District Judge, Room 2102, United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 19th day of February, 1948, at 4:00 in the afternoon of that day, or as soon thereafter as counsel can be heard, for an order granting the defendant's motions to dismiss the complaint for the reasons:

1886

(a) that the defendant was not the employer of the plaintiff at the times mentioned in the complaint;

1887

(b) that the defendant had no contractual relationship with the plaintiff at said times and owed the plaintiff no duty in respect of the illness alleged in the complaint, nor in respect of any medical attendance, care or treatment therefor and;

(c) that at the close of the plaintiff's case he had failed to produce evidence sufficient to support the allegations of the complaint; and that the Court direct a verdict in favor of the defendant upon the first cause of action alleged in the complaint for the reasons above stated and for the reason that the evidence in the record is insufficient to support said alleged first cause of action;

1888 *Memorandum Denying Motion to Set Aside Jury's Verdict on the Second Cause of Action.*

And in the event that the Court fails to grant any of the relief above requested, that an order be entered, setting aside the verdict of the jury, upon the first cause of action alleged in the complaint and any judgment entered thereon because it is (a) contrary to the evidence, (b) contrary to the weight of the evidence, (c) not supported by the evidence and (d) grossly excessive, unjust and capricious; and for a new trial upon said alleged cause of action and for such other and further relief as may
1889 be just.

Dated, New York, N. Y., February 17, 1948.

Yours, etc.,

HORACE M. GRAY,
Attorney for Defendant,
Office & P. O. Address,
42 Broadway,
Borough of Manhattan,
City of New York.

To:

BERTRAM J. DEMBO, Esq.,
1890 Attorney for Plaintiff,
220 Broadway,
New York, N. Y.

Memorandum Denying Motion to Set Aside Jury's Verdict on the Second Cause of Action.

February 19, 1948.

Motion argued by both sides, and, after arguement, denied.

ALFRED C. COXE,
D. J.

Memorandum Denying Motion by Defendant to Dismiss the Complaint, to Set Aside the Verdict and for a New Trial. 1891

February 19, 1948.

Motion argued by both sides and taken under advisement.

A. C. C.

February 20, 1948.

Motion denied.

ALFRED C. COXE,
D. J.

1892

Judgment.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

The issues in the above entitled action having been brought on regularly for trial before the Hon. ALFRED C. COXE, and a jury, on Feb. 2-3-4-5-6 and 9, 1948, and the jury having rendered a verdict in favor of the plaintiff, on the 1st cause of action for the sum of $100,000 and for the defendant on the 2nd cause of action; it is 1893

ADJUDGED: That the plaintiff have judgment against the defendant for the sum of $100,000.

Dated, New York, Feb. 24, 1948.

s/ WILLIAM V. CONNELL,
Clerk.

3/1/48 Plaintiff's costs taxed @ $171.80.

/s WILLIAM V. CONNELL,
Clerk.

1894

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that Cosmopolitan Shipping Company, Inc., defendant in the above entitled cause, hereby
1895 appeals to the next United States Circuit Court of Appeals, for the Second Circuit, to be held in the United States Court House, Borough of Manhattan, City and State of New York, from the Final Judgment of this Court entered in this action on or about the 24th day of February, 1948, and from each and every part of the said Judgment.

Dated: New York, N. Y., March 18, 1948.

Yours, etc.,

1896

HORACE M. GRAY,
Attorney for Defendant,
42 Broadway,
New York 4, New York.

To:

WILLIAM V. CONNELL, Esq.,
Clerk.

BERTRAM J. DEMBO, Esq.,
Attorney for Plaintiff,
220 Broadway,
New York, N. Y.

Appellant's Designation of Record.

1897

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Pursuant to Rule 75 of the Rules of Civil Procedure, the defendant-appellant hereby designates the following portions of the record and proceedings to be included in the record on appeal:

1898

1. Summons and complaint.
2. Answer.
3. Interrogatories addressed to plaintiff.
4. Answers of plaintiff to interrogatories.
5. Clerk's minutes of trial.
6. Stenographer's minutes of trial.
7. All exhibits received in evidence.
8. Notice of motion by defendant, dated February 16, 1948, to dismiss complaint, for a directed verdict in favor of defendant and to set aside verdict.

1899

9. Notice of motion by defendant, dated February 17, 1948, to dismiss the complaint, to set aside the verdict and for a new trial.
10. Exception of plaintiff to defendant's motion to dismiss the complaint.
11. Notice of motion by plaintiff, dated February 16, 1948, to set aside the jury's verdict on the second cause of action.

1900 *Appellant's Designation of Record.*

12. Memorandum (Coxe, J.) dated February 19, 1948, denying motion by plaintiff to set aside the jury's verdict on the second cause of action.

13. Memorandum (Coxe, J.) dated February 20, 1948, denying motion by defendant to dismiss the complaint, to set aside the verdict and for a new trial.

14. Judgment entered February 24, 1948.

Dated: New York, N. Y., March 23, 1948.

1901

HORACE M. GRAY,
Attorney for Defendant-Appellant,
Office & P. O. Address:
42 Broadway,
Borough of Manhattan,
New York 4, N. Y.

To:

BERTRAM J. DEMBO, Esq.,
Attorney for Plaintiff-Appellee,
220 Broadway,
New York, N. Y.

1902

Stipulation Re Defendant's Exhibit D.

1903

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

ROBERT MCALLISTER, *Plaintiff,* against COSMOPOLITAN SHIPPING COMPANY, INC., *Defendant.*	Civ. No. 36—769.

1904

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties herein that Defendant's Exhibit "D" received in evidence in this action need not be printed as part of the Record on Appeal but that such Exhibit may be referred to upon the argument of the Appeal and the original and/or true reproductions thereof may be handed up to the Court with the same force as if reproduced in the Record, pursuant to Rule XVIII of the Rule of the United States Circuit Court of Appeals, Second Circuit.

1905

Dated: New York, N. Y., April 23, 1948.

BERTRAM J. DEMBO,
Attorney for Plaintiff.

HORACE M. GRAY,
Attorney for Defendant.

1906 **Stipulation as to Record.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

IT IS HEREBY STIPULATED AND AGREED, that the foregoing is a true and correct transcript of the record of the said District Court in the above entitled cause, as agreed
1907 on between the parties.

Dated: New York, N. Y., May , 1948.

BERTRAM J. DEMBO,
Attorney for Plaintiff-Appellee.

HORACE M. GRAY,
Attorney for Defendant-Appellant.

1908

Clerk's Certificate.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

I, WILLIAM V. CONNELL, Clerk of the District Court of the United States of America for the Southern District of New York do hereby certify that the foregoing is a correct copy of the printed transcription of record of the said District Court in the above entitled cause as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed in the City of New York, Southern District of New York on the day of May, in the year of Our Lord, One Thousand Nine Hundred Forty-Eight and the 172nd year of the Independence.

WILLIAM V. CONNELL,
Clerk.

[fol. 638] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1947

No. 288

(Argued June 4, 1948. Decided July 23, 1948)

Docket No. 21023

ROBERT A. MCALLISTER, Plaintiff-Appellee,

against

COSMOPOLITAN SHIPPING CO. INC., Defendant-Appellant

Before Augustus N. Hand, Chase and Clark, Circuit Judges

Appeal from the United States District Court for the Southern District of New York

From a judgment for $100,000 recovered by the plaintiff, a seaman, against the defendant on the first claim in an action brought by the former under the Jones Act the defendant appeals, and from a judgment for the defendant on the second claim brought by the plaintiff against the defendant for maintenance and cure the plaintiff appeals. Affirmed.

[fol. 639] Horace M. Gray, Attorney for Defendant-Appellant; Horace M. Gray and Edward R. Phillips, Counsel.

Bertram J. Dembo, Attorney for Plaintiff-Appellee; Jacob Rassner, Robert Klonsky and Jack Steinman, Counsel.

H. G. Morison, Assistant Attorney General, Leavenworth Colby and Edward L. Smith, Special Assistants to the Attorney General, Admiralty and Shipping Section, Department of Justice, and Martin J. Norris, Attorney, U. S. Maritime Commission, Amici Curiae.

AUGUSTUS N. HAND, Circuit Judge:

This is an appeal from a general verdict after a jury trial of a seaman's action brought under the Jones Act against the defendant for negligence and under the general maritime law for maintenance and cure. The plaintiff claims he was negligently caused to contract poliomyelitis on board a vessel owned by the United States and operated by the War Shipping Administration—the S. S. Edward B. Haines

—while in Chinese waters. The cause of action is alleged to have arisen in November, 1945, after the enactment of the War Shipping Administration (Clarification) Act of 1943 (57 Stat. 45; 50 App'x U. S. Code §1291).

The plaintiff McAllister was second assistant engineer employed by the United States on a government-owned vessel that was operated by the War Shipping Administration. The defendant is a shipping company which contracted with the War Shipping Administration to attend to the accounting and certain other shoreside business of The Haines and [fol. 640] other vessels in accordance with the standard form of General Agency Service Agreement.

The plaintiff claims that the officers of the vessel negligently caused or permitted him to contract polio or infantile paralysis and negligently failed to give him immediate treatment by the so-called "Sister Kenny" method at Shanghai or at Tsing Tao and properly to care for him when sick.

On the first cause of action for negligence, the jury returned a general verdict for the plaintiff for $100,000; upon the second cause of action for maintenance and cure, they found a verdict for the defendant.

With respect to the first cause of action, the defendant appeals from the judgment as well as from the denial of its motions (a) to dismiss the complaint, (b) to direct a verdict on its behalf, (c) to set aside the verdict rendered, and (d) to grant a new trial.

With respect to the second case of action for maintenance and cure the plaintiff appeals from the judgment entered upon a verdict in favor of the defendant on that claim.

The vessel sailed from New York on July 24, 1945, for the Far East. Upon arrival at Shanghai on September 26, 1945, notices were posted by the master stating that there was an epidemic of polio as well as other diseases in that area and orders were given to the crew to eat only in special places and not to mix with the Chinese. Various shore people came on board at Shanghai to do stevedoring work as well as a number of additional passengers. They used the common toilet facilities of the vessel and a common drinking fountain. Likewise the toilet facilities intended for the crew were used by the Chinese who came on at Shanghai. Moreover two Chinese cooks who came on at Shanghai used the same cooking utensils and handled

[fol. 641] the same food as the other cooks on the vessel. There was evidence that the plaintiff was in good health until stricken with polio.

The vessel remained at Shanghai until November 1st when it made a trip to Hong Kong, returning to Shanghai on November 11th. The plaintiff testified that he began to feel ill about that date upon his return to Shanghai, and evidence was presented that the "commonest" period of incubation for polio is twelve to fourteen days, which would have begun during his prior stay at Shanghai where he had been exposed to the polio epidemic which we have discussed. On November 21st and 22nd the plaintiff while sick in bed complained to the chief mate of a stiffness in his neck, arms and legs. The chief mate testified that he was aware of an epidemic of polio in Shanghai at that time and that he then told the master of plaintiff's illness and suggested that a doctor should see him. He also stated that no doctor was secured at that time though there were doctors available at an army base ashore and on army and navy hospital ships in the harbor. Plaintiff also complained of his illness to others on the vessel and testified that he had lost his appetite, felt very weak and dizzy, and had a stiffness of his back, jaw, arms and legs. Thereafter, on November 23rd, The Haines left Shanghai and arrived at Tsing Tao on the 25th, docking on the 28th. During this trip plaintiff's illness increased, and he testified to having a burning sensation in almost his entire body, nausea, and muscular spasms. On November 30th arrangements were made to transfer him to a Marine Corps Hospital at Tsing Tao and this was accomplished the following day. His illness was there diagnosed on December 7th as polio and he was flown to Shanghai where he was received on board a naval hospital ship and his legs immobilized with sand bags. On December 13th he was flown to the Navy Base Hospital at Guam [fol. 642] where the sand bag treatment continued until the 23rd when he was removed by a Navy A. P. A. type transport to the Marine Hospital at San Francisco, arriving on January 17, 1946. There the "Sister Kenny" treatment was first administered. He remained at that hospital until April 16th when he was flown to the East Coast and hospitalized, at his request, at the Marine Hospital at Staten Island, New York. He was discharged from that hospital on May 5th for treatment at Bellevue Hospital in New York City under the supervision of the National Foundation

for Infantile Paralysis. Later treatment was received at the Hospital for the Ruptured and Crippled, under the same auspices. From there he went home where he had treatment by a visiting nurse for the rest of the year.

It appears that the master and others on the vessel had reason to believe as early as November 22nd that the plaintiff might have contracted polio, yet they did nothing to secure diagnosis or treatment for him by physicians until November 30th when the arrangements were made to transfer him to the hospital at Tsing Tao. There was evidence from which the jury might find that the master should have sent the plaintiff to one of the hospital facilities available at Shanghai immediately upon being told of his illness on November 22nd. The plaintiff's medical experts were of the opinion that prompt treatment for a man in his condition in the early stages would have cured his disease or alleviated its effects and that he should have been put in a place where he would have received medical supervision and care, including perhaps treatment similar to that of Sister Kenny, which Dr. DiFiore testified was given patients at U. S. Government hospitals. It is argued, and the contention is supported by plaintiff's medical testimony, that this delay while [fol. 643] traveling to Tsing Tao greatly contributed to the progress of his malady and substantially reduced his likelihood of rehabilitation. We realize that the promptitude of treatment and even the kind of treatment which would have alleviated plaintiff's condition were matters of dispute between the experts called by the respective parties but these questions involved issues of fact which were matters for consideration by the jury and were resolved by it in the plaintiff's favor.

The plaintiff also contends that the defendant was negligent in failing to protect him properly from infection by polio, while the vessel was at Shanghai prior to November 1, 1945. In our opinion, the jury might properly find that his infection was caused by conditions negligently permitted to exist on shipboard at that time which we have already outlined and which were conducive to the transmission of polio. The defendant argues however that plaintiff might have contracted polio when he took shore leave at Shanghai as he frequently did during that period. It is undoubtedly true that no one can be certain where he contracted the disease, but he had been warned by notices posted on the ship that there was danger of contracting polio in that port

and to avoid associating with coolies when on shore and to eat his meals at American clubs available to seamen. This warning coupled with the fact that there was no evidence that the plaintiff did not give heed to it made it permissible for the jury to find that he became infected on shipboard due to negligence of the defendant rather than on shore. Therefore we find it unnecessary to determine whether conditions at Shanghai were such that the plaintiff should have been protected by being denied shore leave. We accordingly hold that there is a basis in the record for a finding by the jury that the defendant was negligent in failing to protect the plaintiff from contact with polio infection as well as in [fol. 644] not giving him prompt and adequate treatment after the infection occurred.

The appeal by plaintiff from the judgment in so far as it denied recovery on the cause of action for maintenance and cure is open to question on the ground that it was not timely. The new Federal Rule of Civil Procedure, 73 (a), shortened the time for appeal to the Circuit Court of Appeals from ninety to thirty days and took effect on March 19, 1948. The judgment of the District Court in this case was entered on February 24, 1948. If, therefore, the plaintiff is required literally to comply with the new rule, he had only about a week in which to take his appeal after the date of defendant's appeal on March 18th and the effective date of this new rule which drastically cut down his time. Rule 86 (b) states that the above new rule, 73 (a), governs further proceedings in actions pending on its effective date, except where in the opinion of the court its application would not be feasible or would work injustice. Under the circumstances we are willing to assume that the application of the new rule would work an injustice and to hold that plaintiff's appeal is properly before us.

Coming to the merits, plaintiff's expert Dr. Frant testified that McAllister would require ten or fifteen years more of treatment and gave an estimate of what that treatment would cost. But Dr. Frant did not state what the treatment was to be. On the other hand, plaintiff's witness Dr. DiFiore, in answer to questions by the court, testified that plaintiff had reached about the maximum of his recovery and that further improvement, if any, would be very slight. He also said that according to his observation such cases showed little, if any, improvement after one year from the onset of the illness, but added that this opinion excluded

the possibility of any relief by surgery. Sister Kenny testified that there are conditions in polio cases which will [fol. 645] not respond to any treatment, and we believe there was evidence because of the testimony of Dr. DiFiore from which a jury might conclude that the plaintiff was beyond further recovery. Plaintiff's counsel relies on the fact that surgical treatment will be needed but what that surgical treatment, if any, would be is not disclosed by the record. Dr. Frant's testimony that he would require years of further treatment nowhere specified surgery, nor would the jury necessarily credit his conclusions in the face of the testimony of Dr. DiFiore to which we have referred. Upon such a record it was a question for the jury what witnesses to believe and whether to allow anything for maintenance and cure.

The defendant earnestly contends that because it was only a general agent of the United States acting under a conventional General Agency Service Agreement it was only liable for its independent torts of which there was no proof, and was not liable as owner *pro hac vice* or for neglect on the part of the master and crew who were chosen by the War Shipping Administration. A similar contention has caused much discussion in the opinions of the courts. In our decisions in *McGowan* v. *J. H. Winchester & Co., Inc.*, and *Buro* v. *American Petroleum Transport Corp.*, filed June 24, 1948, we held that companies which had entered into a type of agency contract similar to the one in the case at bar were not responsible for injuries to persons working on a vessel who were not seamen. We relied on the decision in *Caldarola* v. *Eckert & Co.*, 332 U. S. 155, where a majority of the Supreme Court had applied the rule of non-liability of a general agent to a stevedore for torts. We stated that the *Caldarola* decision and that of this court in *Shilman* v. *United States*, 164 F. 2d 649, had narrowed the holding in *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, to the extent [fol. 646] that such a general agent was liable as an "employer" only to seamen on the vessel who are injured as a result of negligence in connection with its operation.

The *Hust* decision allowed a seaman to recover against the general agent under the Jones Act for injuries suffered through the negligence of the crew prior to the passage of the Clarification Act, 57 Stat. 45; 50 App'x U. S. C. A. §1291. The defendant argues that the *Hust* decision was overruled by the *Caldarola* case, but such a conclusion would not

seem to be open to us in view of the fact that the majority opinion in *Caldarola* expressly distinguished the right of a seaman under the Jones Act, upheld in the *Hust* case, from that of a third person such as a stevedore which was before the court for adjudication. Our decision in *Shilman* v. *United States*, *supra*, does not aid the defendant because we were there dealing with the question of liability of a general agent for seamen's wages and held that the *Hust* case involved only liabilities in tort under the Jones Act and not contractual liabilities. There may be possible conflicts between the *Hust* and the *Caldarola* decisions and some difficulty in reconciling the two, but for the reason we have given we regard the *Hust* case as still controlling upon us.

The defendant argues that the decision in the *Hust* case related only to liability of a general agent for torts occurring prior to the passage of the Clarification Act and that as to causes of action arising after that date the seaman's only remedy is against the United States under the Suits in Admiralty Act. The *Hust* case held that a tort committed prior to the passage of the Clarification Act gave rise to a right of recovery against the general agent under the Jones Act and that Congress did not intend to destroy such a right by the retrospective provision of that Act giving an action against the government. The opinion expressly dis- [Vol. 647] claimed any intention of dealing with liability for prospective acts of negligence, but the theory of liability which it adopted seems to be equally applicable to such acts. The Clarification Act, however, makes no reference to the liability of a general agent and we cannot see why it should be thought to eliminate such liability, if it existed. Moreover, it is to be noted that the government in its brief as *amicus curiae* makes no claim that the Clarification Act has any bearing on the plaintiff's right of recovery. We believe that the purpose of the Act was to clarify the rights against the United States of seamen employed by the War Shipping Administration and not to disturb other rights of seamen against the general agents so far as they existed. The question whether, and how far, such other rights exist is, as we have already said, a matter for determination by the Supreme Court in dealing with the scope of the *Hust* decision. Accordingly we must respectfully differ with the opinion of the Supreme Court of Oregon in *Fink* v. *Shepard S. S. Co.*, 192 P. 2d 258, rehearing denied, 193 P. 2d 537, which held that the Clarification Act prevents a suit against

the agent. We are, therefore, remitted to the theory which we have already expressed that the *Hust* decision governs the situation here and that its reasoning, in spite of any limitation in the opinion of the issues directly passed upon, points toward liability of the general agent under the Jones Act in the present case.

For the foregoing reasons the judgment is affirmed as to both appeals.

[fol. 648] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of July one thousand nine hundred and forty-eight.

Present: Hon. Augustus N. Hand, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

ROBERT A. MCALLISTER, Plaintiff-Appellee,

v.

COSMOPOLITAN SHIPPING CO. INC., Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed as to both appeals.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 649] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Robert A. McAllister v. Cosmopolitan Shipping Co. (288). Judgment. United States Circuit Court of Appeals, Second Circuit. Filed July 23rd, 1948. Alexander M. Bell, Clerk.

[fol. 650] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

Order allowing certiorari

Filed November 22, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary docket and assigned to follow No. 179.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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No. 351

In the Supreme Court of the United States

OCTOBER TERM, 1948

COSMOPOLITAN SHIPPING COMPANY, INC.,
PETITIONER

v.

ROBERT A. MCALLISTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutes and regulations involved	2
Statement	3
Specification of errors to be urged	8
Reasons for granting the writ	9
Conclusion	18
Appendix	19

CITATIONS

Cases:

Brady v. *Roosevelt S. S. Co.*, 317 U. S. 575 ..... 9, 11, 15

Byrne v. *Kansas City, Ft. S. & M. R. Co.*, 61 Fed. 605 16

Caldarola v. *Eckert*, 332 U. S. 155 .. 3, 6, 7, 9, 10, 12, 15, 16, 17

Denton v. *Yazoo & M. V. R. R. Co.*, 284 U. S. 305 ..... 15, 16

Dichmann, Wright & Pugh v. *Weade*, 168 F. 2d 914, pending on petition for certiorari, No. 179, Supreme Court, Oct. Term, 1948 11

Fink v. *Shepard S. S. Co.*, 192 P. 2d 258, rehearing denied, 193 P. 2d 537 ..... 8, 9, 10, 13, 14

Gay v. *Pope & Talbot*, 183 Misc. 162 6

Gaynor v. *Agwilines, Inc.*, 76 F. Supp. 617, affirmed, 1948 A. M. C. 1322 ..... 9, 10, 13, 14, 15

Hardy v. *Shedden Co.*, 78 Fed. 610 16

Hust v. *Moore-McCormack Lines*, 176 Ore. 622, reversed, 328 U. S. 707 ..... 6, 7, 9, 13, 16

McGowan v. *J. H. Winchester & Co.*, 168 F. 2d 924 .. 12

McLamb v. *E. I. DuPont De Nemours & Co.*, 79 F. 2d 966 16

Mitchell v. *Chambers*, 43 Mich. 150 11

Norfolk & W. Ry. Co. v. *Hall*, 57 F. 2d 1004 16

Ole Oleson, The, 20 Fed. 384 11

Palardy v. *American-Hawaiian S. S. Co.*, 1948 A. M. C. 1332 12

Publicker Commercial Alcohol Co. v. *American-Hawaiian S. S. Co.*, 165 F. 2d 1002 11

Standard Oil Co. v. *Anderson*, 212 U. S. 215 15

Statutes:

Federal Employers' Liability Act (35 Stat. 65, as amended, 53 Stat. 1404; 45 U. S. C. 51) 3, 21

Jones Act (41 Stat. 1007; 46 U. S. C. 688) 2, 5, 21

Naval Appropriation Act for 1947 (c. 543, 60 Stat. 481, 501), Sec. 202 1

Suits in Admiralty Act (41 Stat. 525, 46 U. S. C. 741 *et seq.*) 6

War Shipping Administration (Clarification) Act of March 24, 1943, c. 26, 57 Stat. 45, as amended (50 U. S. C. App. 1291) 2, 9, 13, 19
60 Stat. 982, 42 U. S. C. 1331-1336 17
Revised Statutes 1753 (5 U. S. C. 631) 3, 21
Miscellaneous:
Civil Service Rules and Schedules, Title 5, Code of Fed. Regs., p. 48, and 1943 Cum. Supp., pp. 1441, 1488 .. 4, 22
Executive Order 9004, 7 F. R. 2 4
Executive Order 9054, 7 F. R. 837 4
House Merchant Marine and Fisheries Committee, Doc. No. 4, *Compilation of Standard Contract Forms of the War Shipping Administration*, p. 847 1
Story, *Agency* (9th Ed., § 35) 10
War Shipping Administration General Order 12, June 12, 1942, 7 F. R. 4496, 46 C. F. R. Cum. Supp. § 306.3 11
War Shipping Administration General Order 21, Sept. 22, 1942, 7 F. R. 7561, 46 C. F. R. Cum. Supp. § 306.44 3
War Shipping Administration Operations Regulation No. 12, Supplement 1 ..... 4, 23

In the Supreme Court of the United States

OCTOBER TERM, 1948

No.

COSMOPOLITAN SHIPPING COMPANY, INC.,
PETITIONER

v.

ROBERT A. MCALLISTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Cosmopolitan Shipping Company, Inc., a general agent of the former War Shipping Administration,[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on July 23, 1948

[1] By Section 202 of the Naval Appropriation Act for 1947 (c. 543, 60 Stat. 481, 501), the War Shipping Administration was abolished and its duties transferred to the United States Maritime Commission. The Solicitor General appears for petitioner because, in accordance with the wartime general agency agreement between petitioner and the War Shipping Administration, the United States is obligated for any recovery effected to the extent not covered by insurance (W.S.A. Form GAA 4-4-42 (R. 608)). On the standard form insurance which is obtained, the United States in effect assumes the reinsurance of the most substantial part of all losses. House Merchant Marine and Fisheries Committee, Doc. No. 4, *Compilation of Standard Contract Forms of the War Shipping Administration*, p. 847. The defense of such actions is assumed by the Department of Justice whenever it appears to be required by the public importance of the question involved.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (R. 638) is reported at 169 F. 2d 4.

JURISDICTION

The judgment of the Court of Appeals was entered July 23, 1948 (R. 645). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Whether in a case arising after the effective date of the War Shipping Administration Clarification Act of March 24, 1943, petitioner, a private steamship operator employed by the United States, as its agent and not as an independent contractor, to manage and conduct the accounting and certain other shore-side business operations of government vessels, which the United States, as operating owner in possession and control, manned, navigated, and physically managed by government employed masters and crews, is liable for the negligence of the Government's shipmaster and other shore-side agents in exposing respondent, a civil service employee of the Government, to infection, and thereafter failing to furnish him with proper medical care, where such negligence occurred after the effective date of the Clarification Act.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved, *i.e.* the War Shipping Administration (Clarification) Act (57 Stat. 45; 50 U. S. C. App. 1291), the Jones Act (41 Stat. 1007; 46 U. S. C. 688), the Federal

Employers' Liability Act (35 Stat. 65, as amended; 45 U. S. C. 51) and R. S. 1753 (5 U. S. C. 631), together with the applicable Civil Service Rules and War Shipping Administration Operations Regulations, are set forth in the Appendix, *infra*, pp. 19-25.

STATEMENT

The S. S. *Edward B. Haines* was a vessel built and owned by the United States and operated by the War Shipping Administration (R. 358). Petitioner as ship's husband or general agent under the wartime standard form of service agreement GAA 4-4-42 (R. 358-359, Ex. G, R. 608)[2] was employed by the United States to manage and conduct the accounting and certain other shoreside business operations of the *Haines* and other government-operated vessels "in accordance with such directions, orders, or regulations" as the Government might prescribe. Respondent was procured by petitioner from the union for employment by the master of the *Haines* on behalf of the United States in accordance with the requirements of Article 3 A (d) of the agency agreement (R. 104-109, 477-478, 489, 85).[3] The shipping

[2] The form of agreement was in all essential respects the same as that which was before the court in *Caldarola* v. *Eckert*, 332 U. S. 155. It was authorized by General Order 21 of the War Shipping Administration issued September 22, 1942, 7 F. R. 7561, and also appears in full text in 46 C. F. R. Cum. Supp. § 306.44.

[3] "The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and

articles between the master and crew, which respondent signed in the capacity of second assistant engineer, bore the endorsement "YOU ARE BEING EMPLOYED BY THE UNITED STATES" and made petitioner's relation to the vessel clear by specific reference to "Cosmopolitan Shipping Co., Inc., as General Agent for the United States" (R. 360-362; Ex. A, R. 606). Respondent, by virtue of this employment on a government-operated vessel, was technically an unclassified civil service employee. Civil Service Rules, Schedule A, Sec. xxi (1).[4]

From the time the *Haines* left New York with a cargo for the Army at Shanghai until her return to the United States petitioner had no further control over her, and in China, where the events giving rise to respondent's claim occurred, petitioner was not represented and the vessel's shoreside business was attended to exclusively by employees of the Army and the War Shipping Administra-

management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder."

[4] 5 C. F. R., 1943 Cum. Supp., p. 1488, sec. 50.2[1] (Ex. O. 9004, 7 F. R. 2, 8; Ex. O. 9054, 7 F. R. 837). See also War Shipping Administration Operations Regulations No. 12, Supplement 1, *infra*, pp. 23-25.

tion (R. 59, 371-372, 376). Upon the vessel's arrival at Shanghai on September 26, 1945, the master posted notices that an epidemic of polio as well as other diseases prevailed and directed the crew when ashore to eat only in special places and not to mix with the Chinese. But various natives who came aboard at Shanghai to stevedore the vessel, and as passengers on trips to Hongkong and Tsing Tao, were permitted to use the common toilet facilities and drinking fountain of the vessel (R. 33-39, 59-61, 68-69, 331-334). Moreover, the Chinese cooks for the Chinese passengers were allowed to use the same cooking utensils and handle the same food as the vessel's other cooks (R. 38-39). Respondent began to feel ill on November 11, 1945, and the master and officers of the vessel had reason to believe as early as November 22, 1945, that he might have polio, but they did nothing to procure proper diagnosis or treatment by physicians for respondent while the vessel was at Shanghai from November 11 to 23, 1945 (R. 40-50, 70-73, 96-98, 112, 116, 120-127, 328-330, 335). It was only after the vessel docked at Tsing Tao on November 28, 1945, that arrangements were made to transfer respondent to a hospital ashore on November 30, where diagnosis and treatment were begun (R. 60, 80-82, 84, 131). Respondent's medical experts testified that he could have been infected from the Chinese and that he could have been prejudiced by the delay in treatment.

Respondent's action was alleged in two separate counts, the first under the Jones Act (*infra*, p. 21),

predicated on the alleged negligence of his fellow officers, who had been employed by the United States to man, navigate and physically manage a War Shipping Administration owned and operated vessel, in failing to protect him from poliomyelitis infection and in not giving him prompt and adequate treatment after infection occurred. The second count was for maintenance and cure under the general maritime law. His suit was not brought against the United States under the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. 741 *et seq.* Instead, he proceeded, at law, against petitioner, the ship's husband or general agent employed by the United States to attend to the accounting and certain other shoreside business operations of the vessel (R. 3-6).[3] After a trial lasting six days, the district court left the case to the jury under instructions which authorized a verdict against

[3] Respondent's right to bring the statutory action under the Jones Act against petitioner is not here questioned. The Jones Act refers only to "any seaman who shall suffer personal injury in the course of his employment" (46 U.S.C. 688) and does not itself require a commonlaw employer-employee relationship. Prior to the contrary decision of the Oregon Supreme Court in *Hust* v. *Moore-McCormack Lines*, 176 Ore. 662, reversed, 328 U. S. 707, it was generally settled in the lower courts that whenever an agent would be independently liable to third persons for the negligence of its own employees in connection with a government vessel's operation, such third persons, if seamen on the vessel, might enforce such independent liability by suit under the Jones Act with the benefit of jury trial and the absence of the contributory negligence and assumption of risk defenses. See, *e.g.*, *Gay* v. *Pope & Talbot*, 183 Misc. 162, 167. This prior construction was apparently approved by a majority of this Court in *Caldarola* v. *Eckert*, 332 U. S. 155, 159.

petitioner for the negligence of the Government's master, officers, and crew (R. 538). The jury found a verdict for respondent for $100,000 on the first count, which alleged negligence; and found for the petitioner on the second, which was based on maintenance and cure (R. 557). Motions to dismiss the complaint, to set aside the verdict for respondent, and for a new trial were denied by the district court (R. 631) and on appeal the judgment was affirmed by the court below (R. 645).

In a unanimous opinion by Judge Augustus N. Hand, the Second Circuit held that under *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, petitioner was responsible for the negligence of the master and crew. It rejected the view that the holding in *Caldarola* v. *Eckert*, 332 U. S. 155, that the general agent was not an operating agent or owner *pro hac vice*, limited or overruled the *Hust* case, observing (R. 643-644), "such a conclusion would not seem to be open to us in view of the fact that the majority opinion in *Caldarola* expressly distinguished the right of a seaman under the Jones Act." It continued, "There may be possible conflicts between the *Hust* and the *Caldarola* decisions and some difficulty in reconciling the two, but for the reason we have given we regard the *Hust* case as still controlling upon us." The court declared that the *Hust* case held that prior to the passage of the Clarification Act the torts of the master and crew of a government-operated vessel "gave rise to a right of recovery against the general agent under the Jones Act" and that "the

theory of liability which it adopted seems to be equally applicable" to give such rights after that Act, and concluded (R. 644), "The question whether, and how far, such other rights exist is, as we have already said, a matter for determination by the Supreme Court in dealing with the scope of the *Hust* decision." The conflicting view of the Oregon Supreme Court in *Fink* v. *Shepard S. S. Co.*, 192 P. 2d 258, rehearing denied, 193 P. 2d 537, was expressly rejected.

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the Second Circuit erred:

1. In holding that petitioner was liable to respondent for the negligence of his fellow officers who were neither subject to petitioner's orders nor doing work over which petitioner had any authority or control.

2. In failing to hold that in order to recover from petitioner in a statutory action under the Jones Act, respondent was required to establish negligence on the part of some person who was doing the work of petitioner or was subject to petitioner's authority or control.

3. In holding that because petitioner was the "employer" of an injured seaman, within the meaning of the Jones Act, and respondent could thus bring the statutory action against petitioner as such an "employer," petitioner was liable for the negligence of respondent's fellow officers in doing work of the United States over which petitioner had no authority or control.

4. In holding that respondent's right to bring the statutory action under the Jones Act against petitioner was conclusive of the different question of whether petitioner was liable for the negligence of respondent's fellow officers in doing work over which petitioner had no authority or control.

5. In holding that *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, was controlling in a case which arose subsequent to the enactment of the War Shipping Administration (Clarification) Act of March 24, 1943, 57 Stat. 45, 50, 50 U. S. C. App. 1291.

6. In failing to hold that, in a case arising subsequent to the effective date of the Clarification Act this suit is one against the United States to which the United States has not consented.

7. In failing to hold that *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575, 584-585, and *Caldarola* v. *Eckert*, 332 U. S. 155, 159, were controlling in the absence of any evidence that petitioner had or exercised any possession or control of the Government's vessel.

8. In affirming the judgment of the district court holding petitioner liable to respondent.

REASONS FOR GRANTING THE WRIT

The issue presented by this case, in common with those of *Gaynor v. Agwilines, Inc.*, 1948 A. M. C. 1322 (C.C.A. 3), decided August 4, 1948, and *Fink* v. *Shepard S. S. Co.*, 192 P. 2d 258 (Ore.), rehearing denied, 193 P. 2d 537, is whether a civil service employee of the United States, injured while serving as a seaman on a government-operated vessel,

may recover for his injuries in a suit against the ship's husband or shoreside agent of the vessel who did not cause the injuries, who had no authority or control over the work in the course of which injuries occurred, and who owed no duty whatsoever to prevent the injury for which claim is made. The court below has held that he may. The Court of Appeals for the Third Circuit in the *Gaynor* case and the Supreme Court of Oregon in the *Fink* case have held that he may not. We submit that the court below has decided an important question in a manner which is not only in direct conflict with the *Gaynor* and *Fink* cases[6] but which is clearly wrong.

1. The case presents one aspect of the important question of the liability to third persons of private shipping companies employed by the Government as ships' husbands or general agents to attend to the accounting and certain other shoreside business of the government-owned merchant fleet during the wartime period of direct government operation.[7] In *Caldarola* v. *Eckert*, 332 U. S. 155, 158-160, this Court reaffirmed its previous decision

[6] We are advised that petitions for certiorari will be filed in the *Gaynor* and *Fink* cases. The Solicitor General is taking over the defense of those actions because they involve the same question as is here presented. It is our present intention to acquiesce in the granting of the petitions in those cases when filed.

[7] Justice Story in his treatise on *Agency* (9th Ed. § 35) says: "* * * generally, the person designated as ship's husband, * * * is understood to be the general agent of the owners, in regard to all the affairs of the ship in the home port. As such general agent, he is intrusted with authority to direct

in *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, 584-585, and held that the unquestioned right of third persons to maintain an action for maritime tort against a government agent for his independent faults did not impose upon a ship's husband or shoreside agent for the Government the duties of care to such third persons, which would have resulted if the agent had been given possession and control as operating agent of the Government's vessel.

In respect of all third persons, other than seamen, the federal courts of appeal have followed the *Caldarola* case with unanimity and held that the United States alone, and not the ship's husband, is liable for the negligence of the Government's master and crew in the navigation and management of its vessel. *Publicker Commercial Alcohol Co.* v. *American-Hawaiian S. S. Co.*, 165

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all proper repairs and equipments, and outfits for the ship; to hire the officers and crew; to enter into contracts for the freight or charter of the ship, if that is her usual employment; and to do all other acts necessary and proper to dispatch her for and on her intended voyage." See also *Mitchell* v. *Chambers*, 43 Mich. 150 (1880); *The Ole Oleson*, 20 Fed. 384 (C. C. E. D. Wis., 1884). General Order 12 of the War Shipping Administration provides: "A General Agent is one who takes care of the vessel's business on behalf of the War Shipping Administration, under a standard form of service agreement (GAA 4-4-42), appoints agents as directed by the War Shipping Administration to handle those functions which relate to the handling of the cargo and functions incidental thereto, and assumes those duties when not otherwise instructed, obtains all accounting for all revenue and expenses and accounts to the War Shipping Administration for all business of the vessel." 7 F. R. 4496, 46 C.F.R. Cum. Supp. § 306.3.

F. 2d 1002, 1006 (C.C.A. 3); *Dichmann, Wright & Pugh* v. *Weade*, 168 F. 2d 914 (C.C.A. 4); *McGowan* v. *J. H. Winchester & Co.*, 168 F. 2d 924 (C.C.A. 2); *Palardy* v. *American-Hawaiian S. S. Co.*, 1948 A.M.C. 1332 (C.C.A. 3), August 4, 1948.[8] But in respect of the Government's own seamen, the largest and most important single group of third persons, confusion and a conflict of decision have arisen in the lower courts which requires settlement by this Court.

In the present case the court below has held that such civil service employees, unlike all other third persons, may recover for the torts of their fellow government seamen by suit against the ship's husband or shoreside agent of the Government despite the fact that the agent's authority stops at the water's edge, that the United States carefully excluded him from possession and control of its vessels, and that the standard form of agency agreement may be searched from end to end without disclosing any assumption of liability on the part of the ship's husband to exercise care to prevent injuries of the type here involved. The decision below, we submit, is in fundamental disagreement with the *Caldarola* case and the decisions just cited, which unanimously hold that all other third per-

[8] The *Weade* case is now pending on a petition for a writ of certiorari, No. 179, this Term. We are informally advised that petitions will also be filed in the *McGowan* and *Palardy* cases. Owing to the circumstance that the decisions in those cases are not only clearly correct but also squarely within the *Caldarola* case, the Solicitor General has not taken over from the attorneys retained by the Government's underwriters the filing of briefs in opposition in those cases.

sons can recover only from the United States. As already noted, it is in direct conflict with the decisions of the Third Circuit in *Gaynor* v. *Aywilliues, Inc.*, and of the Supreme Court of Oregon in *Fink* v. *Shepard S. S. Co.*, both *supra*; those courts, on almost identical facts, held that the torts of the master and crew are attributable only to the United States, and, therefore, in cases after the enactment of the Clarification Act,[9] proof of actionable negligence of such fellow civil service seamen does not establish a right of recovery against the ship's husband or shoreside agent, but only against the United States.

2. The decision of the court below permitting recovery in a case arising subsequent to the Clarification Act is in admitted conflict (R. 644) with the decision of the Supreme Court of Oregon in *Fink* v. *Shepard S.S. Co., supra*, holding that the election, which this Court held was available to Hust under the retroactive provision of the Clarification Act, to enforce his Jones Act remedies by suit either against the United States pursuant to the Suits in Admiralty Act or against the agent pursuant to the statutory action (328 U. S. at 728, 730) is not available thereafter.

Absent such a right of election it is obvious that the present is a suit against the United States in a manner and form to which it has not consented. It was the intent of Congress, when it gave gov-

[9] War Shipping Administration (Clarification) Act of March 24, 1943, c. 26, 57 Stat. 45, as amended (50 U. S. C. App. 1291, *infra*, p. 19).

ernment seamen the rights of privately employed seamen, to restrict the enforcement of the rights thus given to suits in admiralty against the United States. Those rights were to be measured by those of seamen in private employment rather than by those of other employees in government service. But since the seamen in question were in fact employees in the civil service of the United States and not in private employment, the rights thus given must necessarily be enforced against their employer, the United States. Although general agents are not mentioned, the context no less than the legislative history excludes the notion that they were regarded by Congress as employers of the Government's civil service seamen and liable as such. Had Congress so regarded them, the Clarification Act would have been unnecessary, since as employees of the agent, government seamen, without any additional legislation, would have had the right to recover from the agent under the Jones Act, with the right to jury trial. See *Gaynor* v. *Agwilines, Inc.*, 76 F. Supp. 617, 620 (E. D. Pa.), affirmed, 1948 A.M.C. 1322, August 4, 1948 (C.C.A. 3). In the language of the *Fink* case, "It would have been wholly unnecessary to accord to seamen in private employment the rights of seamen in private employment" (192 P. 2d at 268).

3. Review of the judgment below is necessary not only because of the conflict of decision regarding an important issue, but also because, in our view, the lower court's decision is plainly wrong for failure to take account of this Court's decisions

in *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575, 584-585; *Denton* v. *Yazoo & M. V. R.R. Co.*, 284 U. S. 305, 308-309, and *Caldarola* v. *Eckert*, 332 U. S. 155, 159.

We submit that under settled principles the vicarious liability of the ship's husband or shoreside business agent is limited to the torts of those persons who are doing the work of the agent in attending to such shoreside business and does not extend to the negligence of respondent's fellow civil service officers in doing work of the United States which was not subject to petitioner's control or direction. *Denton* v. *Yazoo & M.V.R.R. Co.*, *supra*; *Standard Oil Co.* v. *Anderson*, 212 U. S. 215, 220-225. There is no doubt that the ship's husband or shoreside business agent of a private principal under a similar form of agreement could not be held liable. The books can be searched in vain for even an attempt to impose the liability of an operating agent or owner *pro hac vice* on the ship's husband or shoreside agent for a private operating owner. The Third Circuit in *Gaynor* v. *Agwilines, Inc.*, applies those settled principles to a shoreside agent of the United States, holding that (1948 A.M.C., at p. 1331), "To the extent that the *Hust* case was authority to the contrary it must, therefore, be regarded as overruled by the *Caldarola* case."

This fundamental rule was ignored by the court below in abdicating its own power of decision and holding that since the majority opinion of this Court in *Caldarola* expressly reaffirmed the right

of a government seaman to maintain his action under the Jones Act, the possible conflicts between the *Hust* and *Caldarola* cases concerning whether a cause of action against the shoreside agent has been established constitutes a matter for determination by this Court (R. 644). But it seems too plain for argument that even if the ship's husband or shoreside business agent may, because of his activities in procuring them for employment by the Government, be deemed in some sense the "employer" of the seamen, which we must emphatically deny, still he is not in possession and control so as to be liable as owner *pro hac vice* of the vessel or employer *pro hac vice* of the civil service master, officers and crew through whom the United States mans, navigates and manages its vessel. Under settled principles, the loaned servant rule applies, and as the civil service crew were not doing the work of the shoreside agent, but exclusively the work of the United States, only the Government is liable for their negligence. *Denton* v. *Yazoo & M.V.R.R. Co.*, 284 U. S. 305, 308-309; *Norfolk & W. Ry. Co.* v. *Hall*, 57 F. 2d 1004, 1008 (C.C.A. 4); *McLamb* v. *E. I. DuPont De Nemours & Co.*, 79 F. 2d 966 (C. C. A. 4); *Hardy* v. *Shedden Co.*, 78 Fed. 610, 613 (C.C.A. 6); *Byrne* v. *Kansas City, Ft. S. & M. R. Co.*, 61 Fed. 605 (C.C.A. 6).

4. The importance of the present case extends far beyond the question of the injured seaman's forum or the extent of his recovery. As this Court recognized in the *Caldarola* case, the consequences to the national and international interests of the

United States of imposing the liability of an operating agent on the ship's husband or general agent employed only to attend to certain parts of the shoreside business of government-operated vessels would be far-reaching. "Serious issues affecting the immunity of Government vessels in foreign ports as well as immunity from regulation and taxation by local governments would needlessly be raised" (332 U. S. at 159). Thus, proceedings on the claim of the State of California for unemployment insurance taxes amounting to over thirteen million dollars are being held in abeyance pending this Court's decision on the question of the liability of government agents to seamen. These claims will proceed if the decision below is allowed to stand. And it must be expected that a like attitude will be taken by other local and foreign governments in respect of other matters of taxation and regulation, so that the Government's vessels will be denied all immunity.[10]

[10] Congress has already made special provision for unemployment compensation for War Shipping Administration seamen. 60 Stat. 982, 42 U.S.C. 1331-1336. Any recovery would therefore be a pure windfall to the state. The argument of the various taxing and regulating authorities appears to be that the right to treat government civil service seamen as employees of the ship's husband for the purposes of taxation and regulation is at least as great as for purposes of a government employee's recovery. Admittedly a ship's husband for a private shipping operator would not be liable. But if, where the United States is the principal, a different rule of liability to government seamen is to prevail despite their clear right to recover from the United States, the same can be argued in respect of taxation and regulation where, unless the agent can be held responsible, the Government and its vessels are entirely immune.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER, 1948.

APPENDIX

1. The War Shipping Administration (Clarification) Act of March 24, 1943, c. 26, 57 Stat. 45 (50 U. S. C. App. 1291), provides in pertinent part:

> (a) Officers and members of crews (hereinafter referred to as "seamen") employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, as amended by subsection (b) (2) and (3) of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. Such seamen, because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act, as amended; the Civil Service Retirement Act, as amended; the Act of Congress approved March 7, 1942 (Public Law 490, Seventy-seventh Congress); or the Act en-

titled "An Act to provide benefits for the injury, disability, death, or detention of employees of contractors with the United States and certain other persons or reimbursement therefor", approved December 2, 1942 (Public Law 784, Seventy-seventh Congress). Claims arising under clause (1) hereof shall be enforced in the same manner as such claims would be enforced if the seaman were employed on a privately owned and operated American vessel. Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. Any claim, right, or cause of action of or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration. Rights of any seaman under the Social Security Act, as amended by subsection (b) (2) and (3), and claims therefor shall be governed solely by the provisions of such Act, so amended. When used in this subsection the term "administratively disallowed" means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration. When used in this subsection the terms "War Shipping Administration" and "Administrator, War Shipping Administration" shall be deemed to include the

> United States Maritime Commission with respect to the period beginning October 1, 1941, and ending February 11, 1942, and the term "seaman" shall be deemed to include any seaman employed as an employee of the United States through the War Shipping Administration on vessels made available to or subchartered to other agencies or departments of the United States.

2. The Jones Act of June 5, 1920, c. 250, § 33, 41 Stat. 1007 (46 U. S. C. 688), provides in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply;***

3. The Employers' Liability Act of April 22, 1908, c. 149, § 1, 35 Stat. 65, as amended, 53 Stat. 1404 (45 U. S. C. 51), provides in pertinent part:

> Every common carrier by railroad *** shall be liable in damages to any person suffering injury while he is employed by such carrier *** for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its *** boats, wharves, or other equipment.

4. Revised Statutes 1753 (5 U. S. C. 631), authorizing the President to prescribe regulations regarding civil service employment, provides:

> The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency

thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service.

5. The Civil Service Rules and Schedules, as odified in Title 5, Code of Federal Regulations, . 48, and 1943 Cum. Supp. pp. 1441, 1488, provide n pertinent part as follows:

CIVIL SERVICE RULE II

SECTION 2.1. *Extent of the classified service.*—The classified service shall include all persons who have been heretofore or may hereafter be given a competitive status in the classified civil service with or without competitive examination, by legislative enactment, or under the civil service rules promulgated by the President, or by Executive orders covering groups of employees with their positions into the competitive classified service or authorizing the appointment of individuals to positions within such service. It shall include all positions now existing or hereafter created by legislative or Executive action, of whatever function or designation, whether compensated by a fixed salary or otherwise, unless excepted from classification by specific affirmative legislative or Executive action. No right of classification shall accrue to persons whose appointment or assignment to classified duties is in violation of the civil-service rules. [E. O. 7915, June 24, 1938, effective Feb. 1, 1939; 3 F. R. 1519.]

* * * * *

SECTION 2.3. *Exceptions from classification.*—(a) Positions in Parts 50 and 51 are excepted from the classified service.

(b) Appointments to the excepted positions named in Part 50 may be made without examination or upon noncompetitive examination. * * * [E. O. 7915, June 24, 1938, effective Feb. 1, 1939, as amended by E. O. 8083, Apr. 10, 1939, effective May 1, 1939; 3 F. R. 1519, 4 F. R. 1577.]

* * * * * *

SECTION 50.0. *Certain positions excepted from examination under § 2.3.*—The positions designated in this part are excepted from examination, but not more than one position shall be treated as excepted under any title unless a different number of positions be indicated (Rule XVI, sec. 1, E. O. 209, Mar. 20, 1903, 5 C. F. R. 16.1) [Regs. CSC, as of June 1, 1938].

* * * * * *

§ 50.21. *United States Maritime Commission.*—(a) All positions on Government-owned ships operated by the United States Maritime Commission [E. O. 9004, Dec. 30, 1941; 7 F. R. 2].

NOTE: These positions were transferred to the War Shipping Administration by E. O. 9054; 7 F. R. 837.]

6. War Shipping Administration Operations Regulation No. 12, Supplement 1, provides as follows:

OPERATIONS REGULATION No. 12
SUPPLEMENT No. 1, OCTOBER 7 1944

Pertaining to All Vessels Owned by or Under Charter to the War Shipping Administration (Dry Cargo and Passenger Vessels, Tankers, Colliers and Small Craft)

Subject: Employee Status of Certain Personnel Employed by Agents.

This Supplement No. 1 to Operations Regulation No. 12 is issued for the purpose of clarifying the employment status of certain personnel employed by Agents in the conduct of the business of vessels or their cargo under the GAA, TCA, and BA agreements.

It is clear from the provisions of Article 3A (d) of the General Agency Service Agreement that Masters and crew members are employees of the United States, but no specific provision is made in the GAA, TCA, or BA agreements as to whether other personnel are employees of the United States or of the Agents, General Agents, or Berth Agents. Reading the provisions of the agreements as a whole it is also clear that, except for the Master, officers, and crew, persons employed by an Agent, General Agent, or Berth Agent are employees of such Agents and not of the United States.

1. Excepting only additions to the vessel's crew and employees of independent contractors, personnel employed by General Agents pursuant to Operations Regulation No. 12 are employees of the General Agent and not of the United States. Other personnel directly employed by Agents, General Agents, and Berth Agents, (and their Sub-Agents) to perform work in connection with vessels or their cargo and special work incident thereto, including shore gangs, checkers, tallymen, watchmen, guards, coal trimmers, and other extra labor, but excluding relief officers, shore relief, and crew members, are employees of such Agents and not of the United States.

2. The direct labor costs of the employees of Agents referred to in paragraph 1 shall

be paid for from the corporate funds of the Agents, and, in accordance with Article 7 of the service agreements, the Agent may reimburse himself for such expenses from the special bank account established for use in connection with the service agreements. Such costs shall include, but without limitation, taxes (employer's contributions only) payable pursuant to the Federal Insurance Contributions Act (OAB tax) and to any state or federal unemployment insurance law in respect of the direct labor to which the same may be applicable; and premiums on workmen's compensation insurance carried pursuant to the Federal Longshoremen's and Harbor Workmen's Compensation Act and any state workmen's compensation laws in respect of the direct labor to which the same may be applicable. Such costs shall not include compensation for supervisory services or overhead of the Agent.

3. With respect to the work performed by the employees of Agents referred to in paragraph 1, the Agent shall be indemnified to the full extent provided under the applicable service agreement, regardless of the fact that the employees in question are employees of the Agent and not of the United States.

4. The interpretation and instructions contained in this Regulation need not be applied retroactively by the Agents.

(Sgd.) G. H. Helmbold,

G. H. HELMBOLD,

Assistant Deputy Administrator for Ship Operations.

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No. 351

In the Supreme Court of the United States

OCTOBER TERM, 1948

COSMOPOLITAN SHIPPING COMPANY, INC.,
PETITIONER

v.

ROBERT A. MCALLISTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	4
Statement	4
Specification of errors to be urged	10
Summary of argument	11
Argument:	
I. The importance the United States of the general agency cases	25
II. The controlling cases on the liability of a general agent (*Hust* and *Caldarola*) require dismissal of respondent's suit	34
III. The United States, and not its agents, was the operating owner in exclusive possession and control of its vessels, and its agents, such as petitioner, were solely shoreside business agents	44
1. Introduction and summary	44
2. The background of the change-over in 1942, from bareboat chartered private operation to direct government operation, establishes that the United States and not the agents was operating the vessels	47
3. The distribution of the various operating duties between the shipmasters, the general agents, and the berth agents, as compared with their unified exercise by the agent under the former agreements, establishes that the United States and not the agents was operating the vessels	53
4. The procedure for manning War Shipping Administration vessels establishes that the United States and not its agents was the operating owner in exclusive possession and control	61
5. The precise terms of the general agency agreement, and the similarity of the duties of general agents to the other types of agents employed by the Government, establishes that the United States and not the agents was operating its vessels	76

820446—49——1

Argument—Continued Page

6. Examination of the Operations Regulations governing wartime direct government operation confirms that the agent did not operate the vessels 86

7. The treatment by Congress of War Shipping Administration seamen establishes that the United States and not its agents was operating the vessels 95

8. Conclusion 101

IV. The United States as operating owner in exclusive possession and control of its vessels, and not its general agents, was solely responsible for the acts of the master and crew 102

1. Only one who is owner or owner *pro hac vice* operating the vessel is liable for the acts of the master and crew in its navigation and management 103

2. Neither before nor after the Clarification Act has there been any basis for applying a different rule to government agents who are not operating the vessel 109

V. The Clarification Act requires that after its enactment government-employed seamen shall vindicate their rights exclusively by suit against the United States under the Suits in Admiralty Act 114

1. The background of the Clarification Act indicates that suit was to be brought only under the Suits in Admiralty Act 115

2. The legislative history of the Clarification Act shows suits were to be brought only under the Suits in Admiralty Act 118

3. The Clarification Act in terms requires that suit be brought only under the Suits in Admiralty Act 127

Conclusion 134

Appendix A 135

Appendix B 142

Appendix C 171

CITATIONS

Cases:

Adams v. *Homeyer*, 45 Mo. 545 ..... 58, 106

Aird v. *Weyerhaeuser S. S. Co.*, 169 F. 2d 606 114

American Stevedores v. *Porello*, 330 U. S. 446 116

Baccarat v. *Andrew F. Mahoney Co.*, 1938 A. M. C. 1652 108

Ballou v. *Kemp*, 92 F. 2d 556 130

Brady v. *Roosevelt S. S. Co.*, 317 U. S. 575 ..... 11, 14, 15, 22, 24, 26, 37, 40, 50, 58, 59, 110, 125

Butler v. *Boston & Savannah S. S. Co.*, 130 U. S. 527 55

Cases—Continued

Page

Byrne v. *Kansas City, Ft. S. & M. R. R. Co.*, 61 Fed. 605 113
Caldarola v. *Eckert*, 332 U. S. 155 5, 11, 13, 22, 26, 34, 39–44, 57, 62, 111, 112, 114
Carroll v. *United States*, 133 F. 2d 690 51, 111, 117
Cimorelli v. *N. Y. Central R. Co.*, 148 F. 2d 575 36
Clyde Commercial S. S. Co. v. *West India S. S. Co.*, 169 Fed. 275 58, 106
Conlon v. *Hammond Shipping Co.*, 55 F. Supp. 635 114
Cox v. *Lykes Bros.*, 237 N. Y. 376 20, 35, 103, 108
Del Norte, The, 119 Fed. 118 108
Denton v. *Yazoo & M. V. R. R. Co.*, 284 U. S. 305 113
Dowler v. *Johnson*, 225 N. Y. 39 106
Emergency Fleet Corp. v. *Lustgarten*, 280 U. S. 320 110
Escoe v. *Zerbst*, 295 U. S. 490 129
Everett v. *United States*, 284 Fed. 203, certiorari denied, 261 U. S. 615 108
Farrel v. *McCleal*, 1 Dallas 392 55
Feldman v. *American Palestine Line*, 18 F. 2d 749 108–109
Federal Land Bank v. *Hansen*, 113 F. 2d 82 130
Fink v. *Shepard S. S. Co.*, 192 P. 2d 258, No. 360, this Term 1, 11, 33, 72, 119, 120, 130, 131, 134
Gay v. *Pope & Talbot*, 183 Misc. 162 36, 111
Gaynor v. *Agwilines*, 169 F. 2d 612, No. 430, this Term 2, 11, 66, 114, 130, 131
Grimberg v. *Columbia Packers' Ass'n*, 47 Ore. 257, 83 Pac. 194 58, 105, 156, 107
Hagar v. *Clark*, 78 N. Y. 45 105
Handley v. *Lombardi*, 122 Cal. App. 22 106
Hardy v. *Shedden Co.*, 78 Fed. 610 113
Hodgson v. *Dexter*, 1 Cranch 345 108
Hughes v. *Southern Pacific Co.*, 274 Fed. 876 55, 65, 108
Hust v. *Moore-McCormack Lines*, 328 U. S. 707 10, 11, 13, 22, 26, 31, 34–43, 62, 110, 126, 130, 132
International Stevedoring Co. v. *Haverty*, 272 U. S. 50 36
Jensen v. *Lehigh Valley R. Co.*, 255 Fed. 795 130
Jentry v. *United States*, 73 F. Supp. 899 117
John E. Berwind, The, 56 F. 2d 13 108
Johnson v. *Emergency Fleet Corp.*, 280 U. S. 320 125
Jones v. *Kennedy* 121 F. 2d 40, certiorari denied, 314 U. S. 665 110
Lajoie v. *Milliken*, 242 Mass. 508 110
Lewis v. *U. S. Navigation Co.*, 57 F. Supp. 652 111
Malewicki v. *Qvale*, 298 Fed. 301 110
McCormick v. *Moore-McCormack Lines*, 54 F. Supp. 399 51, 111, 117
McGowan v. *J. H. Winchester & Co.*, F. 2d 924, certiorari denied, 335 U. S. 861 111
McLamb v. *E. I. DuPont De Nemours & Co.*, 79 F. 2d 966 113

Cases—Continued.

	Page
Mexico v. *Hoffman*, 324 U. S. 30	30
Moser v. *Standard Oil Co. of New Jersey*, 60 F. Supp. 6	111
Moss v. *Alaska Packers Assn.*, 70 Cal. App. 2d 857	111
Murray v. *American Export Lines*, 53 F. Supp. 861	111
Murray v. *Edes Mfg. Co.*, 305 Mass. 311	139
Navemar, The, 303 U. S. 68	30
Nolan v. *General Seafoods Corp.*, 112 F. 2d 515	35
Norfolk & W. Ry. Co. v. *Hall*, 57 F. 2d 1004	112
Odgaard v. *Cosmopolitan Shipping Co.*, 171 Misc. 244	37, 50, 58
O'Neal v. *United States*, 11 F. 2d 869, affirmed, 11 F. 2d 871	96, 116
Pacific Imp. Co. v. *Schubach-Hamilton S. S. Co.*, 214 Fed. 854	105
Palartly v. *American-Hawaiian S. S. Co.*, 169 F. 2d 619, No. 186, Misc., this Term	57
Parks v. *Ross*, 11 How. 362	108
Pennsylvania R. Co. v. *Roth*, 163 F. 2d 161, certiorari denied, 332 U. S. 830	36
Posey v. *T. V. A.*, 93 F. 2d 726	96, 116
Publicker Commercial Alcohol Co. v. *American-Hawaiian S. S. Co.*, 165 F. 2d 1006	111
Quinn v. *Southgate Nelson Corp.*, 121 F. 2d 190, certiorari denied, 314 U. S. 682	35, 37, 50, 58
Raymond v. *Tyson*, 17 How. 53	105
Reed v. *United States*, 11 Wall. 591	104
Riggin v. *Brown*, 59 Fed. 1005	110
Roberts v. *United States S. B. Emergency Fleet Corp.*, 240 N. Y. 474	108
Robertson v. *Sichel*, 127 U. S. 507	110
Schaller v. *Matson Nav. Co.*, 43 N. Y. S. 2d 566	111
Seas Shipping Co. v. *Sieracki*, 328 U. S. 85	36
Shilman v. *United States*, 164 F. 2d 649, certiorari denied, 333 U. S. 837	62, 113
Smith v. *School District*, 241 Mich. 366	130
State ex rel. Wendling Bros. Co. v. *Board of Education*, 127 Ohio St. 336	130
State ex Inf. McKittrick v. *Wymore*, 343 Mo. 98	130
Stewart v. *U. S. Shipping Board Emergency Fleet Corp.*, 7 F. 2d 676	35, 49
Thorp v. *Hammond*, 12 Wall. 408	107
Twin Falls Canal Co. v. *American Falls Dist. No. 2*, 59 F. 2d 19, certiorari denied, 287 U. S. 638	83
United States v. *Loyola*, 161 F. 2d 126	116
United States v. *Lubinski*, 153 F. 2d 1013	130
United States v. *Shea*, 152 U. S. 178	104
U. S. Merchant Fleet Corp. v. *Dietrich*, 27 F. 2d 681	83
U. S. Shipping Board Emergency Fleet Corp. v. *Greenwald*, 16 F. 2d 948	35, 49
Volund, The, 181 Fed. 643	58, 106, 107
Weade v. *Dichmann, Wright & Pugh*, No. 179, this Term	1, 11
Whitney v. *Wyman*, 101 U. S. 392	108

Cases—Continued Page
Williams v. *American Foreign S. S. Corp.*, 65 F. Supp. 900 111
Worrall v. *Davis Coal Co.*, 122 Fed. 436 107
Zinkhan v. *District of Columbia*, 271 Fed. 542 110
Statutes:
Act of June 6, 1941, Sec. 3 (b), 55 Stat. 244 84
Federal Employees' Pay Act of June 30, 1945, c. 212, Sec. 607 (f), 59 Stat. 295, 305 97
Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. 51 112, 137
Jones Act, Act of June 5, 1920, 41 Stat. 1007, 46 U. S. C. 688 36, 112, 137
Merchant Marine Act, 1936, 46 U. S. C. 1194, 1197 (c) 50
R. S. 1753, 5 U. S. C. 631 54, 137
Ship Warrant Act, 55 Stat. 591, as amended, 56 Stat. 370 52
Social Security Act Amendments of August 10, 1946, c. 951, 60 Stat. 978:
42 U. S. C. 1331–1336 31, 98
United States Employees' Compensation Act, 1916, 39 Stat. 742, 5 U. S. C. 751 *et seq* 67
46 U. S. C. 564, 565 65
26 U. S. C. 1606 (f) 97
46 U. S. C. 577 65, 66
46 U. S. C. 713 65
46 U. S. C. 747 30
50 U. S. C. App. 1273 (b) 84
War Shipping Administration (Clarification) Act of March 24, 1943, 57 Stat. 45, as amended; 50 U. S. C. App. 1291:
Sec. 1 36, 114, 129, 130, 135
Sec. 3 (j) 3, 11, 19, 24, 25, 83, 95
26 U. S. C. 1426 (i) 31, 96
42 U. S. C. 409 (o) 31, 96
Miscellaneous:
Atlantic and Gulf Coast Agents of WSA, In re, 16 War Lab. Rep. 23 75
Bouvier, *Law Dictionary* (1934) 55
Title 46, Code of Fed. Regs:
1943 Cum. Supp., p. 11417, sec. 306.5 77
1943 Cum. Supp., p. 11427 (7 Fed. Reg. 7562) 77
1943 Cum. Supp., p. 11433 (7 Fed. Reg. 7565) 77
1943 Cum. Supp., p. 11437 (7 Fed. Reg. 7567) 77
1943 Supp., p. 2113 (8 Fed. Reg. 17512) 77
1944 Supp. p. 2113 77
Civil Service Rules, Schedule A, sec. xxi (1), 5 Code of Fed. Regs. p. 48 and 1943 Cum. Supp., p. 1488:
Sec. 2.1 138
Sec. 2.3 139
Sec. 50.0 139
Sec. 50.21 6, 54, 139

Miscellaneous—Continued

	Page
88 Con. Rec. 8384	126
89 Cong. Rec. 963	119, 127
89 Cong. Rec. 1919–1920	127
94 Cong. Rec. 7389	100
94 Cong. Rec. 7503	100
Executive Order No. 9004, 7 F. R. 2, 8	6, 54
Executive Order No. 9054, 7 F. R. 837	6, 54, 72
GAA 4–4–42 (wartime standard form of agency agreement), 46 C.F.R. Cum. Supp. sec. 306.44	5, 6, 14, 38, 42, 44, 63, 64, 76, 83, 88
Art. 1	60
Art. 2	60, 87
Art. 3A	6, 16, 60, 61, 62, 76, 79, 80
Art. 7	80
Art. 8	82
Art. 9	84
Art. 10	84
Art. 11	84
Art. 12	84
Art. 14	60, 79
Art. 16	81, 82
Art. 20	53, 84
Exhibit A	53
General Admiralty Rule 46, as amended June 8, 1942 (316 U. S. 717)	33
Hearings before House Ways and Means Committee on H. R. 3736, 79th Cong., 1st sess., pp. 703–705	76
House Merchant Marine and Fisheries Committee Document No. 4, 1945, *Compilation of Standard Contract Forms of the War Shipping Administration:*	
Pp. 124–137	37, 51
P. 330, fn. 11	37
P. 367	88
P. 847	2
House Merchant Marine and Fisheries Committee, Hearings on H. R. 7424, 77th Cong., 2d sess.:	
P. 10	127
P. 31	120
P. 33	122
H. R. 7424, 77th Cong., 2d sess.	119, 120
H. R. 133, 78th Cong., 1st sess.	119, 125
H. R. 4873, 80th Cong., 2d sess.	99
H.R. 483, 81st Cong., 1st sess.	100
H. Rep. 107, 78th Cong., 1st sess.	67, 72, 75, 96, 101, 119, 125
H. Rep. 248, 78th Cong., 1st sess.	119
H. Rep. 2060, 80th Cong., 2d sess.	100
H. Rep. No. 2447, 79th Cong., 2d sess., pp. 7–9	99
H. Rep. No. 2526, 79th Cong., 2d sess., p. 7	99

Miscellaneous—Continued Page

H. Rep. No. 2572, 77th Cong., 2d sess. 28, 29, 123
Issues in Social Security, Report of Ways and Means Committee of the House of Representatives by the Committee's Social Security Technical Staff pursuant to H. Res. 204, 79th Cong., 1st sess., p. 401 76
1 Labatt, *Master and Servant* (2d ed., 1913), pp. 102–103 105
Letter of General Counsel, U. S. Maritime Commission, to Department of Justice, April 28, 1947 28, 37, 44, 58, 79, 142
Maritime Cases, In re, 26 War Lab. Rep. 509 74
2 Parsons, *Shipping* (1869), pp. 3–13 54
Restatement of Agency, § 79, Comment (a) 62, 106
S. Rep. 62, 78th Cong., 1st sess. 96, 119
S. Reps. 1655, 1813, 77th Cong., 2d sess. 119, 124
S. Rep. 1862, 79th Cong., 2d sess., pp. 5–6 99
Story, *Agency*, Secs. 35, 36, 313 54, 55, 105
U. S. Employees' Compensation Commission 28th Annual Report (1944), p. 5 67
20 War Lab. Rep. at 465, 468 75
War Shipping Administration:
General Order 12, June 12, 1942; 7 F. R., 4496, 46 C. F. R., 1943 Cum. Supp., p. 11417 56
General Order 12, Supp. 1, June 22, 1942, as amended by Supp. 7, Sept. 22, 1942; 7 F. R. 4741, 7561, 46 C. F. R., 1943 Cum. Supp., p. 11417 56
General Order 21, Sept. 22, 1942, 7 F. R. 7561 5
General Order 21, Supp. 4, Dec. 29, 1943; 8 F. R. 17512, 46 C. F. R., 1943 Supp., p. 2113 56
War Shipping Administration Operations Regulations:
No. 1, May 25, 1942 68, 69
No. 1, Supplement 1, July 13 1942 68, 69
No. 1, Supplement 2, July 13, 1942 69
No. 1, Supplement 3, August 6, 1942 68, 69
No. 1, Supplement 4, August 15, 1942 70
No. 1, Supplement 6, June 19, 1943 70
No. 4 89
No. 9, Supplement 1 89
No. 12, Supplement 1 6, 54, 90, 139
No. 15, Directive No. 2 90
No. 16, Directive No. 3 91
No. 30 91
No. 42 91
No. 43 91
No. 46 92
No. 48 92
No. 50 92
No. 51, Supplement 2 92
No. 52
No. 54

Miscellaneous—Continued
War Shipping Administration Operations Regulations—Con. Page
No. 56 93
No. 58 93
No. 62 93
No. 63 93
No. 81 94
No. 83 94
No. 84 ..... 79, 171
No. 87 94
No. 99, Supplement 2 94
War Shipping Administration Press Release 1171 (W), Feb. 25, 1942 52
War Shipping Administration Statements of Policy 68, 69

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 351

COSMOPOLITAN SHIPPING COMPANY, INC.,
PETITIONER

v.

ROBERT A. McALLISTER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The District Court did not enter an opinion. The opinion of the United States Court of Appeals for the Second Circuit (R. 638) is reported at 169 F. 2d 4.

JURISDICTION

The judgment of the Court of Appeals was entered July 23, 1948 (R. 645). The petition for certiorari was filed on October 14, 1948, and was granted on November 22, 1948.[1] The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

[1] On the same day, this Court also granted certiorari in No. 360, *Fink* v. *Shepard SS. Co.*, and No. 430, *Gaynor* v.

QUESTION PRESENTED

During World War II the United States, on the organization of the War Shipping Administration in February 1942, took over the direct physical operation of the government-owned merchant fleet. It terminated the various bare-boat charters under which the Maritime Commission had demised the Government's vessels for private operation by charterers who, as owners *pro hac vice* in possession and control, manned, navigated and physically managed the vessels as their own. It replaced this prior peacetime method of private operation by direct government operation of the vessels, employing three independent types of agents, among whom it distributed the various

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Agwilines, Inc., and set those cases down for hearing following No. 179, *Weade* v. *Dichmann, Wright & Pugh*, in which certiorai had already been granted and which also involved the question of the liability of general agents of the former War Shipping Administration. The Solicitor General appears for petitioner in this case and for respondents in the other cases because, in accordance with the wartime general agency agreement between petitioner and the War Shipping Administration, the United States is obligated for any recovery effected to the extend not covered by insurance (W. S. A. Form GAA 4-4-42 (R. 608)). On the standard form insurance which is obtained, the United States in effect assumes the reinsurance of the most substantial part of all losses. House Merchant Marine and Fisheries Committee Doc. No. 4, *Compilation of Standard Contract Forms of the War Shipping Administration*, p. 847. The defense of such actions is assumed by the Department of Justice whenever it appears to be required by the public importance of the question involved.

operating duties. As its agents afloat, to man, navigate and physically manage, and operate the vessels, the War Shipping Administration employed experienced ship masters, officers and crews, who were subject to its exclusive control and were technically unclassified civil service employees of the United States. As its agents ashore, to operate the accounting and certain other shoreside business of the vessels, it employed experienced shipping operators as ships' husbands or general agents, but excluded them from any authority or control over the operation of the vessels themselves and the masters, officers and crews by whom the Government directly manned, navigated, managed and operated its vessels. As agents to manage and conduct the loading of cargo and to render other berth and port services to its vessels, it employed shipping operators having existing berthing and stevedoring facilities. Various third parties, such as crew members, longshoremen and passengers, injured as a result of the negligence of the Government's masters and crews in the navigation and management of its vessels, have brought suit against the shoreside business agents.

The question for decision is whether, with respect to causes of action arising after the effective date of the War Shipping Administration (Clarification) Act of March 24, 1943, these shoreside business agents, such as petitioner here, are liable to third parties, such as respondent, for the acts of the Govern-

ment's civil service master and crew in doing work which was not assigned to such shoreside agents nor subject to their authority or control, but was exclusively work which the United States, as disclosed principal operating the vessels, had assigned to the master as its independent agent and employee.[2]

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved, *i. e.*, the War Shipping Administration (Clarification) Act (57 Stat. 45; 50 U. S. C. App. 1291), the Jones Act (41 Stat. 1007; 46 U. S. C. 688), the Federal Employers' Liability Act (35 Stat. 65, as amended; 45 U. S. C. 51) and R. S. 1753 (46 U. S. C. 631), together with certain applicable Civil Service Rules and War Shipping Administration Operations Regulations, are set forth in Appendices A and C, *infra*, pp. 135–141, 171–176.

STATEMENT

Respondent Robert A. McAllister signed shipping articles on July 23, 1945, with the master of the S. S. *Edward B. Haines* for a foreign voyage, in the capacity of second assistant engineer (R. 606). The *Haines* was a vessel built and owned by the United States and was operated by the War Shipping Administration (R. 624).

[2] The question has been restated in general terms so as to cover the fundamental question which this Court must decide in disposing of the *Fink* and *Gaynor* cases as well as this case, and could reach in the *Weade* case.

Petitioner Cosmopolitan Shipping Company was employed by the United States, under the wartime standard form of agency agreement GAA 4-4-42, as a ship's husband or general agent to operate the accounting and certain other shoreside business of the *Haines* and other government-operated vessels "in accordance with such directions, orders, or regulations" as the Government might prescribe (R. 358–359; Ex. G, R. 608).[3]

The articles on which respondent was employed bore the endorsement "YOU ARE BEING EMPLOYED BY THE UNITED STATES" and expressly identified petitioner as its agent (R. 358–365; Ex. A, R. 606). Similarly, the collective bargaining agreement under which respondent was thus employed by the United States was between the War Shipping Administration, represented by petitioner as its general agent, on the one hand, and the National Marine Engineers' Beneficial Association, representing respondent as his authorized collective bargaining representative, on the other (R. 586, 604). The agreement expressly recited that it was entered into "in compliance with the direction of the Administrator, War Shipping Administration," applied to all vessels "operated by the War Shipping Administration and allocated under a Gen-

[3] The form of agreement was in all essential respects the same as that which was before the Court in *Caldarola* v. *Eckert*, 332 U. S. 155. It was authorized by General Order 21 of the War Shipping Administration issued September 22, 1942, 7 F. R. 7561, and also appears in full text in 46 C. F. R. Cum. Supp. sec. 306.41.

eral Agency Agreement to said General Agent," and provided that the United States, as owner, "shall have the right to select his own employee provided such employee is a member of the Marine Engineers' Beneficial Association in good standing" and that "Nothing in this agreement shall prevent the owner from discharging any licensed engineer officer who is not satisfactory to it" (R. 586–587). By virtue of this government employment on a government-operated vessel, respondent's technical status was that of an unclassified civil-service employee of the United States. Civil Service Rules, Schedule A, sec. xxi (1).[4]

Petitioner procured McAllister from his union hiring hall for employment by the master of the *Haines* on behalf of the United States in accordance with the cited requirements of the collective bargaining agreement and Article 3A (d) of the agency agreement (R. 104–109, 477–478, 489, 85).[5] From the time the *Haines* left New

[4] 5 C. F. R., 1943 Cum. Supp., p. 1488, sec. 50.21 (Ex. O. 9004, 7 F. R. 2, 8; Ex. O. 9054, 7 F. R. 837). See also War Shipping Administration Operations Regulations No. 12, Supplement 1, Appendix A, *infra*, pp. 139–141.

[5] "The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by

York with a cargo for the Army at Shanghai until her return to the United States, petitioner had no further control over her, and in China, where the events giving rise to respondent's claim occurred, petitioner had no representatives and the vessel's local shoreside business was operated exclusively by employees of the Army and the War Shipping Administration (R. 59, 371–372, 376).

Upon the vessel's arrival at Shanghai on September 26, 1945, the master posted notices that an epidemic of polio as well as other diseases prevailed and directed the crew when ashore to eat only in special places and not to mix with the Chinese (R. 29–33, 68–69, 331). Respondent was allowed to go ashore almost daily in Shanghai between September 26 and November 1, 1945, but there is no evidence that he became infected there (R. 196–197). Various natives were sent aboard at Shanghai to unload the vessel during the period from her arrival until November 1, 1945, and as passengers on trips to Hongkong from November 1–5 and to Tsingtao from November 23–28. These natives, although provided with separate toilet facilities, were not prevented from using the com-

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the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder."

mon toilet and drinking fountain facilities of the vessel (R. 33–39, 59–61, 331–334). Chinese cooks for the Chinese passengers were also permitted to use the same cooking utensils and handle the same food as the vessel's other cooks (R. 38–39).

Respondent began to feel ill November 11, 1945, on the vessel's return to Shanghai from Hongkong, but did not report sick until November 24, 1945, the day after leaving Shanghai for Tsingtao. As early as November 22, 1945, however, there was reason for the master and officers of the *Haines* to believe respondent might have a serious disease such as polio, but no steps were taken to procure proper diagnosis and treatment before the vessel left Shanghai on November 23, 1945 (R. 40–50, 67–72, 95–97, 112, 116, 120–127, 198, 328–330, 335). It was only after the vessel docked at Tsingtao on November 28, 1945, that arrangements were made to transfer respondent ashore on November 30, where correct diagnosis was made and treatment begun (R. 60, 80–82, 84, 131). As a result of the polio infection respondent suffered injury of a permanent character. Respondent's medical experts testified that he could have been infected from the Chinese who came aboard and that he might have been prejudiced by the delay in commencing treatment.

Respondent did not sue the United States, but filed a complaint at law against petitioner alone, alleging that petitioner operated the *Haines*

under a general agency agreement; that respondent "was in the employ of" petitioner and was entitled to maintain the action against petitioner under the Jones Act; that respondent suffered injury by the negligence of petitioner and of the officers and fellow seamen aboard the vessel, more particularly in taking Chinese citizens aboard without physical examination and without taking adequate sanitary precautions for the safety of respondent and by failing to provide respondent prompt and proper medical care; and that by reason thereof respondent was injured to his damage in the sum of $250,000 (R. 3–5). The complaint added a second cause of action for maintenance and cure under the general maritime law in the amount of $25,000 (R. 5–6). Petitioner answered, denying liability (R. 6–7), and after a trial lasting six days, the district court left the case to the jury under instructions which authorized a verdict against petitioner for the negligence of the Government's master, officers and crew (R. 538). The jury found a verdict for respondent for $100,000 on the Jones Act count, but found for the petitioner on the question of maintenance and cure (R. 557). Motions to dismiss the complaint, to set aside the verdict for respondent, and for a new trial were denied by the district court (R. 631). On appeal, the judgment was affirmed by the court below in reliance, so far as concerns the issue presented here, upon this Court's decision in *Hust* v.

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Moore-McCormack Lines, 328 U. S. 707 (R. 638–645).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the Second Circuit erred:

1. In failing to hold that in order to recover from petitioner in a statutory action under the Jones Act, respondent was required to establish negligence on the part of some person who was doing the work of petitioner or was subject to petitioner's authority or control.

2. In holding that petitioner was liable to respondent for the negligence of his fellow officers who were neither subject to petitioner's orders nor doing work over which petitioner had any authority or control.

3. In holding that because petitioner was the "employer" of an injured seaman, within the meaning of the Jones Act, and respondent thus could bring the statutory action against petitioner as such an "employer," petitioner was liable in such an action for the negligence of respondent's fellow officers in doing work of the United States over which petitioner had no authority or control.

4. In holding that respondent's right to bring the statutory action under the Jones Act against petitioner was conclusive of the different question of whether petitioner was liable for the negligence of respondent's fellow officers in doing work over which petitioner had no authority or control.

5. In failing to hold that, in a case arising subsequent to the effective date of the War Shipping Administration (Clarification) Act of March 24, 1943, 57 Stat. 45, 50, 50 U. S. C. App. 1291, this suit is one against the United States to which the United States has not consented.

6. In holding that *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, was controlling in a case which arose subsequent to the enactment of the Classification Act.

7. In failing to hold that *Brady* v. *Roosevelt S. S. Co.,* 317 U. S. 575, 584–585, and *Caldarola* v. *Eckert,* 332 U. S. 155, 159, were controlling in the absence of any evidence that petitioner had or exercised any possession or control of the Government's vessel.

8. In affirming the judgment of the district court holding petitioner liable to respondent.

SUMMARY OF ARGUMENT

I

The issue in this case, as in No. 360, *Fink* v. *Shepard S. S. Co.,* No. 430, *Gaynor* v. *Agwilines,* and No. 179, *Weade* v. *Dickmann, Wright & Pugh,* is the reach of this Court's decision in *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, where it was held that an employee of the United States, serving as a seaman on a vessel held to have been operated by Moore-McCormack for the War Shipping Administration, could recover damages for personal injuries in a suit against Moore-McCor-

mack. The importance to the United States of the reach of the *Hust* decision rests upon the possible effect on its sovereign immunity from foreign and local interference in so far as the operations of its vessels are concerned. In time of national emergency, it is essential that the merchant fleet be operated directly by the Government, both for reasons of control and for secrecy. Yet if masters and crews of government-operated vessels are considered, under the general agency agreements involved in all of these cases, to be employees of the general agents, then the latter must be regarded as owners *pro hac vice*, and grave problems of regulation, taxation, control, and wartime security are bound to arise. The financial question is of but little importance, for if the government be sued directly under the Suits in Admiralty Act it must pay the judgment, as likewise it must pay a judgment against the general agent, if the agent reasonably defends itself.

Both the problem of liability to local and foreign regulation and taxation, and that of violation of secrecy, are more than academic. States and foreign governments have sought to tax the operation of government-owned and operated vessels on the grounds that the activities taxed were those of the general agents and not the United States. Suits against agents in state courts before juries make it impossible to preserve wartime secrecy in respect of such matters as convoy instructions, the details of swept channels and

harbor defenses, the operation of secret navigation and detection equipment, and other equally confidential matters. During the war, this Court, by a special rule, was able to preserve secrecy in the United States admiralty courts, but no such power exists with regard to state courts and the presence of juries would seem to make the application of any similar method impracticable.

II

In our view, proper interpretation of this Court's decisions in *Hust* and in *Caldarola* v. *Eckert,* 332 U. S. 155, requires that petitioner, as a general agent under a GAA 4-4-42 agreement, be held not liable, as a matter of law, on respondent's claim. The combined effect of these cases is to establish that, in cases where (as here) the prospective provisions of the Clarification Act apply, general agents under GAA 4-4-42 are subject to liability only for the torts of their own employees; that the general agents are not owners *pro hac vice* of the vessels which the United States itself operates; and are not liable for the acts of the masters and crews, with whom the United States mans, navigates and physically operates its vessels, and who are exclusively agents or employees of the United States.

III

1. The *Caldarola* case was correct in holding that general agents, such as petitioner, did not

have possession and control of the vessel and were not owners *pro hac vice*. The duties assigned to general agents under standard form GAA 4-4-42, which the Government employed in the operation of its vessels during wartime, restricted the authority of these agents to the operation of the shoreside business of the vessels. They neither manned, operated nor navigated the vessels themselves. In private employment, as we show in Point IV, such a relationship would clearly not give rise to liability on the part of the agent for the acts of the master and crew of the vessels which it was husbanding. Consideration of the circumstances in which the Government assumed wartime operation of its vessels, of the method of manning the vessels, of the terms of GAA 4-4-42 and the implementing WSA regulations, and of congressional approval of the procedures adopted, compel a like result here and demonstrate that the agents were not operating agents or owners *pro hac vice*.

2. During World War I, the government vessels were operated directly by the United States Shipping Board. In peacetime, the Government demised its vessels for private operation either under bareboat charters, or, where that was impossible, under operating agency agreements such as that involved in *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575. During World War II, the Government again took over the direct operation of its vessels. To accomplish this, it employed

agents: experienced shipmasters for the navigation and physical management and operation of its vessels; experienced shipping companies as its general agents to husband the vessels ashore, and as berth agents to operate the business of dicharging cargo and other port services.

Nowhere in the GAA 4–4–42 agreement is there found any language amounting to a demise or delivery of physical possession of the vessel, despite many attempts by claimants to establish the contrary. This is the critical aspect in which the wartime agreement differed from the bareboat charters used from 1940 to 1942, as well as from the previous operating agency agreement employed in the *Brady* case, which required the "Managing Agent * * * to man, equip, victual, supply and operate the vessels." Under the agreement here involved, the master, as the direct "agent and employee of the United States," manned, navigated and physically managed and operated the vessel. This crucial change was made in the Spring of 1942 because the Government deliberately desired to return, during the war, to exclusive possession and control of its vessels.

3. The distribution of the various operating duties between the shipmasters, the general agents, and the berth agents, as compared with their unified exercise by the agent under the former agreements, establishes that the United States, and not its agents, was operating the vessels.

4. The procedure for manning the vessels likewise establishes that the United States retained its position of operating owner in exclusive possession and control. At the time the merchant fleet was requisitioned in March and April 1942, some 55,000 seamen were employed to man approximately 1,375 vessels, of which the United States owned only 10 percent and operated none. On VJ–day, in August 1945, over 220,000 seamen were manning some 4,300 vessels of which the United States owned and operated 90 percent. Article 3A (d) of GAA 4–4–42 made it plain that the master was the direct agent and employee of the United States, and that the crew, although procured through customary channels, were its employees. The article provides that the general agent shall "procure" the master for the United States; that the master shall be an "agent and employee" of the United States; and that the general agent shall procure and make available the officers and men for engagement by the master on behalf of the United States. The agreement further requires the general agent to procure the officers and men "through the usual channels and in accordance with the customary practices", and that the officers and crew "shall be subject only to the orders of the Master." The entire arrangement discloses that the general agent merely "operates" the "business" of the vessels, but has no authority over the master and no part in operating the vessels themselves.

This is confirmed by the seamen's contract of employment. The WSA required that the articles should state the name of the registered owner or operating company as "United States of America, War Shipping Administration," and in the space for address, "c/o XYZ Company, General Agent." In the instant case, the articles bore the stamped endorsement "YOU ARE BEING EMPLOYED BY THE UNITED STATES." Shipmasters and crew members were expressly made unclassified civil-service employees of the United States and, prior to the Clarification Act, the United States Employees' Compensation Commission granted them benefits under the United States Employees' Compensation Act.

At the time WSA devised this program of government operation with civilian personnel, collective bargaining agreements established the wages, working conditions, and employment practices of the majority of seamen. In order to satisfy the seamen and avoid delay, WSA signed over-all collective bargaining arrangements, known as the "Statements of Policy", with the nine principal maritime unions. In general, the Statements declared that preexisting labor policies would be maintained unless changed by agreement between the unions and WSA, and that general agents would be required to conform. By subsequent regulations, general agents were directed to follow existing collective bargaining agreements where they existed with the unions not parties to

the over-all arrangement or were authorized to negotiate agreements where none existed. No modifications or new agreements were to be effective until approved by WSA. By a practical arrangement with the National Labor Relations Board, the Administrator of WSA utilized the Board's facilities for the designation of bargaining units, while reserving WSA's right in respect of the Board's jurisdiction over the personnel of WSA operated vessels. A similar practical arrangement was entered into with the National War Labor Board in matters of labor disputes and wage stabilization. Finally, WSA became a participating signatory employer of the "Statement of Principles" which created the Maritime War Emergency Board to deal with matters of wartime compensation and bonus which could not be solved by the parties because of the restrictions of wartime secrecy. As a result of the foregoing, not only Federal agencies but almost all the States have always recognized WSA seamen as employees of the United States and the vessels as operated by the Government.

5. The precise terms of the general agency agreement, which were amplified by regulations issued pursuant thereto, and the similarity of the duties of general agents to those of the other types of shoreside agents employed by the Government (berth agents and berth subagents) establishes that the United States, and not its agents, was operating the vessels. A detailed

analysis of the various articles of the GAA 4-4-42 agreement establishes that the operations assigned to the general agents were those of husbanding, and that the functions of physical operation, management, and control of the vessels were retained exclusively by the United States. In fact, most of the provisions of the agreement were equally applicable to berth agents and berth subagents, who have never been thought or contended to be "operating agents."

6. The detailed regulations and instructions issued to general agents serve only to confirm that they were a mere channel of government control. They show the United States as operating owner commanding its shipmasters, through its agents who serve only as channel of communication.

7. Congressional treatment of WSA seamen establishes that the United States, and not its agents, was operating the vessels. The Clarification Act (57 Stat. 45) constitutes a specific legislative recognition that seamen serving on vessels owned or bareboat chartered to the United States, were government employees. That Act provided for the payment of Social Security contributions on behalf of such government seamen who theretofore had been excluded from the benefits of the Act. In other statutes, Congress explicitly dealt with such seamen in a manner which recognized that they were exclusively government employees. This is particularly true with re-

spect to unemployment compensation for which Congress made specific provision. Committee reports are replete with statements recognizing their status as government employees.

8. The materials set forth in this Point conclusively establish that the Government and not the general agents manned, navigated, and physically operated the vessels; that the general agents were neither operating agents in possession of the vessels nor even owners *pro hac vice;* and that the seamen manning those vessels were employees of the United States and not employees, in any sense, of the general agents.

IV

The United States, as operating owner in exclusive possession and control of its vessels, and not its general agents, was responsible for the acts of the master and crew. The limited nature of the general agent's authority has been explained, and it is unquestionable that between private parties such a relationship would not give rise to liability on the part of the agent for the acts of the principal's employees. No reason exists for applying a different rule to the United States.

1. Only one who is owner or owner *pro hac vice* operating the vessel is liable for the acts of the master and crew in its navigation and management. This rule is so settled in maritime law that only one case (*Cox v. Lykes Bros.*, 237 N. Y. 376),

dealing even obliquely with the question, has been found. If there is any doubt as to whether the general owner has divested himself of possession and control of the vessel, then it is presumed there has been no such divestment. In the maritime field it is essential to the status of an operating agent or owner *pro hac vice* that he be placed in exclusive possession and control of the vessels. Otherwise the agent is in the same position as a charterer to whom the use of the vessel but not the vessel itself is delivered. No liability for the negligence of the master and crew may be imputed to the latter nor to the agent who is not owner *pro hac vice*. And the function of the ship's husband in procuring the seamen clearly does not render him liable; an agent procuring servants for a principal is not responsible for their torts, nor is a superior servant liable for the negligence of a subordinate agent. The right of seamen to recover wages, and maintenance and cure follows the same rule. The operating owner alone is liable, because the contract of employment—the shipping articles—were entered into between the master, his agent, and the members of the crew. It is accordingly only in situations where language sufficient to constitute a demise of the vessel has been employed, that an agent would become an operating agent and thus an owner *pro hac vice* responsible for the acts of the master and members of the crew.

2. Certainly, no reason exists for applying a different rule where the United States is the principal. It is settled law, on the contrary, that a public agent is not responsible for the acts of subagents in the discharge of his official duties. Nothing in *Brady* v. *Roosevelt S. S. Co.* indicates the opposite. That case merely held that an agent operating a vessel of the United States under a demise was responsible for the acts of its own employees, even though the financial loss would ultimately be borne by the United States. Aside from *Hust* v. *Moore-McCormack Lines,* 328 U. S. 707, and the few lower court cases resting exclusively upon it, the established rules of maritime law have been uniformly followed. Even in those cases, while the agent has been deemed an "employer" for the purpose of being subjected to suit under the Jones Act, he is liable only for the negligence of persons performing his own work. The principle of the loaned servant rule applies and relieves him of liability for negligence of those doing another's work. Like principles govern claims for wages, cure, and maintenance. Thus, the application of the traditional rules of liability, applied in the *Caldarola* case, should be dispositive of the present case.

V

The Clarification Act requires that government-employed seamen shall vindicate their rights, arising after its enactment, exclusively by suit against the United States under the Suits in

Admiralty Act. The purpose of the Clarification Act, its legislative history, and the language which Congress employed, make this clear.

1. When the Government took over the operation of the merchant fleet in 1942, it was being operated exclusively by private shipping firms. Seamen manning that fleet had rights against their private employers under the Jones Act and the general maritime law, even where the privately operated vessels were government owned. When the Government took over, these seamen became unclassified civil service employees of the United States whose rights were thought to be restricted exclusively to those arising under the U. S. Employees Compensation Act. The change-over in employment occurred while many vessels were at sea and the rights of the seamen were, naturally, obscure. It was desired to preserve to those seamen their prior rights, and WSA asked Congress for legislation which would exclude them from the Government Employees' Compensation Act and continue their former rights under the Jones Act and the federal maritime law against their new employer, the United States. To preserve their rights during the change-over period, it was recommended that they have the right of election to proceed against their former private employer, to take the benefits of the Government Employees Compensation Act, or to enforce their rights under the Jones Act and the general maritime law against the United States.

2. The Clarification Act was before both the 77th and 78th Congresses. At an early stage, it was apparent that, on the advice of the Attorney General, the right to jury trial would not be permitted under the proposed Act, and that seamen would be remitted exclusively to a remedy against the United States under the Suits in Admiralty Act. Representatives of the various maritime unions, aware that their exclusive remedy would be against the United States, protested the exclusion of trial by jury. The reports make it clear that both houses of Congress nevertheless envisaged that the exclusive remedy would be by suit against the United States, and without a jury. The intervention of this Court's decision in *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, during the preparation of the legislation, did not affect its form, for Congress recognized that the GAA 4-4-42 husbandry agreement was essentially different from the Roosevelt form of operating agency agreement. Changes in the language of the bill during its consideration emphasize that general agents were not to be held liable.

3. The language of the Act is unambiguous. It requires that seamen, after the date of its enactment, "shall" bring suits for the vindication of their rights under the Suits in Admiralty Act. As only the United States may be sued under that Act, it is clear that no right of action against general agents, other than for their own torts, was intended to be continued. The use of "may" in

juxtaposition to "shall," in providing for the right of election in claims arising before the enactment, fortifies the mandatory intent of the word "shall." Finally, the provision for administrative disallowance before the institution of suit underscores the exclusiveness of the remedy against the United States. It could serve no purpose if its application could be avoided by asserting the claims against the agents instead of against the Government.

ARGUMENT

I

THE IMPORTANCE TO THE UNITED STATES OF THE GENERAL AGENCY CASES

The issue in this case, as in No. 360, *Fink* v. *Shepard S. S. Co.*, No. 430, *Gaynor* v. *Agwilines*, and No. 179, *Weade* v. *Dichmann, Wright & Pugh*, is the reach of this Court's decision in *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, where it was held on the limited record then before the Court that in a case arising prior to the War Shipping Administration (Clarification) Act of March 24, 1943, c. 26, 57 Stat. 45 (50 U. S. C. App. 1291), an employee of the United States, serving as a seaman on a vessel conceded to be operated by Moore-McCormack Lines for the War Shipping Administration, could recover damages for personal injuries by suit against Moore-McCormack instead of against the United States.

The importance to the United States of the reach of the *Hust* decision extends far beyond the question of the injured third party's forum or the extent of his recovery. As this Court recognized in *Caldarola* v. *Eckert,* 332 U. S. 155, the consequences to the national and international interests of the United States of imposing the liability of operating agents on the ships' husbands or general agents, who are employed merely to operate certain parts of the shoreside business of government-owned and operated vessels, would be far-reaching. "Serious issues affecting the immunity of Government vessels in foreign ports as well as immunity from regulation and taxation by local governments would needlessly be raised" (332 U. S. at 159). In *Brady* v. *Roosevelt S. S. Co.,* 317 U. S. 575, 585, this Court indicated that the question of liability differs from that of suability, and we believe that on the facts of the present cases, as of *Caldarola,* the *Hust* case does not here "reach the 'different question' whether 'a cause of action' against the Agent had been established" (332 U. S. at 160).

In time of war or national emergency preceding and following a war, national security requires that the United States directly operate the government-owned cargo fleet with masters and crews employed by the Government and responsible exclusively to it. Congress in both world wars gave specific direction and authority for such exclusively governmental operation, as opposed to the

private operation under bareboat charters and operating agency agreements which it had directed for the employment of the government-owned cargo fleet in time of peace. Obeying this Congressional command, the War Shipping Administration, as operating successor to the Maritime Commission, directly operated all government-owned vessels during World War II exactly as had the Shipping Board and its operating agency, the Emergency Fleet Corporation, during World War I.

It is of the greatest importance to the United States that the Government, and not its business agents, be recognized as operating owner in possession and control of government vessels which are manned, operated, and navigated by the Government through ship masters who were its direct agents and employees, and which were victualled, supplied, and maintained by it through shipping operators who were employed as ships' husbands and berth agents to operate the shoreside business of the vessels. If the masters and crews of such government vessels can be treated as the employees of such shoreside business agents rather than of the United States, then the latter must be deemed owners *pro hac vice* or operating agents of the vessels and the Government a mere reversionary owner who has parted with possession and control of its vessels.

The conclusion that the agents are operating the vessel and not merely its shoreside business is of

little practical importance to any such agent, for if the agents require the Government to assume their defense or reasonably defend themselves in litigation brought against them, they are entitled to reimbursement and indemnity from the United States. See *infra*, pp. 82–84. But to the Government, the results of the conclusion that such agents are operating agents in possession and control, may well be destructive of civilian government operation during future emergencies which may require direct government operation. Such a conclusion would make it undesirable for the Government again to follow the practice of employing the existing shoreside organizations of private shipping concerns to operate the business of government vessels.[a] It would probably induce the United States, in any future emergency, to operate all such vessels as part of its military sea trans-

[a] See H. Rept. No. 2572, 77th Cong., 2d sess., p. 8: "The Administrator, in the conduct of his duties and functions, makes very extensive use of the private organizations including those engaged in merchant marine insurance and related activities, steamship operators, stevedore, and terminal facilities, freight forwarders, and freight brokers and agents. Special skill, knowledge, and experience are made available in this manner for use in the integrated war effort. This development confirms the wisdom of the congressional policy in the recent years of stimulating and assisting the development of such private merchant marine and insurance facilities at substantial Government cost. The policy has permitted a quick change-over from peacetime to wartime operations of the entire merchant marine without any substantial loss of efficiency or impairment of morale." (Cf. letter of the General Counsel, U. S. Maritime Commission, Appendix B, *infra*, pp. 142, 149.)

port service and to expand or create complete new shoreside organizations of its own, with consequent increased expense and delay in effecting its direct operations.

The employment of existing private operators as agents, who are purposely denied possession or control over the Government's vessels and their masters and crews, is in strict conformity with the congressional policy of aiding the development of private shipping organizations for just such employment in national emergencies. It was in accordance with this plan that the War Shipping Administration terminated the pre-war contracts under which private operators had been owners *pro hac vice* of Government vessels and substituted direct Government operation with their aid as shoreside business agents. Moreover, in private shipping operations the use of shoreside business agents has been followed for many decades and in no instance have they ever been held to be operating agents of the vessel or employers of their masters and crews.

It seems obvious that Congess did not intend to authorize the violent alteration of the Government's authority over its vessels' operation in time of war that would result from regarding the general agents as owners *pro hac vice* exactly as when they were bareboat operators. Yet if the master and crew of government vessels can be deemed the employees of the vessels' shoreside business agents, these agents and not the

United States become the operating owners to whom the vessel belongs for the voyage and the vessels, not being in the possession of public authority, will not again be entitled to governmental immunity in foreign ports. Cf. *Mexico v. Hoffman*, 324 U. S. 30, 37–38; *The Navemar*, 303 U. S. 68, 74. Such a conclusion plainly defeats the intention of Congress, which has always taken care expressly to reserve the sovereign immunity of such vessels, although it has accepted civil responsibility for their acts. See 46 U. S. C. 747. Nothing in any act of Congress justifies holding that by employing private shipping operators, as general agents and berth agents, to operate certain shoreside business of the vessels, the Government has created an operating agency of the vessels themselves, transferred the operating ownership of the vessels in time of war and, without Congressional authority, abandoned such immunity in an emergency when its preservation is most important.

If the master and crew can be treated as employees of the agents so that the latter become thereby the operating agents of owners *pro hac vice*, the Government's vessels will also lose immunity in this country from regulation and taxation by State and local governments. In every case where private vessels are subjected to such regulation and taxation, government vessels, if they are thus deemed to be privately operated, may be similarly taxed and regulated. This last

consideration is already of particular importance in connection with the assertion of the liability of the United States, through its agents, for State unemployment insurance taxes. In the case of Government seamen employed through the War Shipping Administration, the Congress has made special statutory provision both for old age and survivors' insurance benefits[7] and for unemployment compensation insurance benefits.[8] If it be held that the Government's master and crew are employees of the shoreside agent instead of the United States, and that the former is operating agent or owner *pro hac vice* in possession and control of the government vessel, the agents will face the requirement of collecting additional taxes from both the seamen and the United States and of paying them over to the State government having local territorial jurisdiction of the agent. The point is of more than academic interest. The United States is currently resisting the attempt of the California tax authorities, based on their interpretation of *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, to collect over thirteen million dollars as unemployment insurance taxes on account of War Shipping Administration seamen. Such payment, more-

[7] War Shipping Administration (Clarification) Act of March 24, 1943, c. 26, 57 Stat. 45, as amended (26 U. S. C. 1426 (i); 42 U. S. C. 409 (o)).

[8] Social Security Act Amendments of August 10, 1946, c. 951, 60 Stat. 978, 42 U. S. C. 1331–1336.

over, will be without any corresponding increase in benefits to either the seamen or the Government, since Congress has already made special provision for unemployment benefits in such cases. Attempts are likewise being made by Iran, Iraq, and Cuba to impose various taxes for former visits of War Shipping Administration vessels to their ports. And there appears to be little doubt that, if in any future emergency similar operations were resumed, these countries, as well as others, would insist on their right to regulate, as well as tax, the Government's vessels as privately operated.

Finally, if the master and crew are employees of the agent which operates the vessel's shoreside business and the latter is the operating agent or owner *pro hac vice* in possession of the Government's vessel, the United States may be required to disclose secret defense procedure before juries in state court suits brought against agents because of damage or collision alleged to result from negligent operation, navigation and management of its vessels by the master and crew. The dangers inherent in such a result are tremendous. In time of war, litigation seeking to fix responsibility for such collisions involves convoy and routing instructions, the details of swept channels and other harbor defense procedures, the operation of secret detection and navigation equipment, and countless other matters of the highest secrecy. During the recent war, this Court, by special ad-

miralty rule effective in all United States courts, provided for the impounding of pleadings and the hearing of cases *in camera*, in order to protect the national interest in these respects.[9] No such action could be effectually taken if cases were to be tried before juries and in the state courts.

And to a lesser extent the same problem of secrecy is presented even in cases of personal injuries occurring on the high seas. Not only do many cases of personal injury arise from collision, but even when they do not, questions of defense procedures and defe[illegible]e installations are frequently involved.[10] Even when the suits were to be in federal courts where some steps to enforce secrecy could be taken, and despite the strenuous insistence of the seamen's unions that jury trial be accorded, "Congress, for reasons which to it seemed sufficient, determined to withhold that right from Government-employed seamen for the duration of the war." *Fink* v. *Shepard S. S. Co.*, 192 P. 2d at 268–269. To hold that the Govern-

[9] General Admiralty Rule 46, as amended June 8, 1942 (316 U. S. 717). Such collision risks are not insured by the Government and the defense is conducted solely by attorneys of the Department of Justice assisted by representatives of the government agency involved.

[10] In admiralty, General Admiralty Rule 46 is, of course, equally applicable. Such personal injury risks are covered by protection and indemnity underwriters who are in turn reinsured by the Government. Defense is conducted under the supervision of the Department of Justice by private attorneys appointed by the underwriters to act as of counsel to the United States Attorney for the district involved.

ment's shoreside agents are operating agents or owners *pro hac vice* and therefore subject to suit for the acts of the master and crew of the Government's vessels, would defeat this intention of the Congress and permit these actions to be tried before juries in State courts, thereby opening the way for the disclosure to the enemy of information which may be detrimental to the lives and safety of seamen, as well as to the safety of the country itself.

II

THE CONTROLLING CASES ON THE LIABILITY OF A GENERAL AGENT (*HUST* AND *CALDAROLA*) REQUIRE DISMISSAL OF RESPONDENT'S SUIT

We believe that the combined effect of the Court's two recent cases in this field (*Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, and *Caldarola* v. *Eckert*, 332 U. S. 155) is to require reversal of the decision below and dismissal of respondent's suit, without further examination of the relationship between the United States and its general agents or between the master and crew of the Government vessel and the general agent. Analysis of these holdings discloses that their combined effect is to declare that the agent is not liable for a tort of the kind for which respondent sues.

In *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, a divided court of seven members held, on a limited record, including the admission of Moore-McCormack's answer that it "was operating the

Liberty Ship S. S. *Mark Hanna* for and on behalf of the United States,'" that a civil-service employee of the United States, serving as a seaman on a government-owned vessel operated by the War Shipping Administration, could recover under the Jones Act for injuries resulting from the negligence of his fellow civil-service employees, the master and crew of the vessel, either by suit against the United States itself or, at his election, against the Government's general agent for the vessel. The majority opinion, by Justice Rutledge, declared that the general agent was an "operating agent" or "private operator" of the Government's vessel (328 U. S. at 717, 718, 720, 721, 724, 727, 730, 732) to whom, as such, the negligence of the master and crew is imputed.[11] The majority further upheld the right of crew members of government vessels to maintain such suits equally under the Jones Act and the general maritime law (see 328 U. S. at 719, 720), holding "it does not follow from the fact that Hust was technically the Government's employee that he lost all remedies against the operating 'agent' for

[11] October Term 1945, No. 627, R. 6. Cf. *Nolan v. General Seafoods Corp.*, 112 F. 2d 515, 517 (C. A. 1).

[12] It is well settled that an agent actually operating the vessel as distinct from operating its business "must be held, like a charterer, to be an owner *pro hac vice*." *Cox v. Lykes Bros.*, 237 N. Y. 376, 383; *U. S. Shipping Board Emergency Fleet Corp. v. Greenwald*, 16 F. 2d 948, 951 (C. A. 2); *Stewart v. U. S. Shipping Board Emergency Fleet Corp.*, 7 F. 2d 676, 678 (E. D. N. Y.); cf. *Quinn v. Southgate-Nelson Corp.*, 121 F. 2d 190 (C. A. 2), certiorari denied, 314 U. S. 682. As such, the agent is liable for the torts of the master and crew. Cf. Point IV, *infra*, p. 102.

such injuries as he incurred" (328 U. S. at 724).[13] Finally, the Court held that the provision of Section 1 of the Clarification Act (*infra*, p. 135), giving seamen of War Shipping Administration vessels a retroactive right of election to pursue any remedies available to them prior to the enactment of that Act, confirmed these rights of recovery against operating agents, observing, "We need not determine in this case whether prospectively the Clarification Act affected rights of the seaman against the operating agent and others, or simply made sure that his rights were enforceable against the Government" (328 U. S. at 727). As to Hust's claim, which arose prior

[13] The Jones Act refers only to "any seaman who shall suffer personal injury in the course of his employment" (46 U. S. C. 688) and by its terms does not seem to require a common-law employer-employee relationship. Prior to the contrary decision of the Oregon Supreme Court in the *Hust* case (176 Ore. 662), it had been generally held in the lower courts that whenever an agent would be independently liable to third persons for the negligence of employees doing its own work in connection with a government vessel's shoreside business, such third persons, if seamen, might enforce such independent liability by suit under the Jones Act, with the benefit of jury trial and absence of the contributory negligence and assumption of risk defenses. See *e. g.*, *Gay* v. *Pope & Talbot*, 183 Misc. 162, 167; *infra*, pp. 111–113. Since they are considered "seamen" for the purposes of the Jones Act (*International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 52), longshoremen, who load and unload the vessel under direction of the ship's officers, though technically employees of a contracting stevedore, would appear equally entitled to Jones Act benefits. Cf. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 95; *Pennsylvania R. Co.* v. *Roth*, 163 F. 2d 161 (C. A. 6), certiorari denied, 332 U. S. 830; *Cimorelli* v. *N. Y. Central R. Co.*, 148 F. 2d 575, 577 (C. A. 6).

to that Act, it was declared (328 U. S. at 730–731), that the change from prior peacetime private operation, under forms of agreement by which the Government had demised its vessels on bare-boat conditions to charterers or operating agents [14] who operated them as owners *pro hac vice*, manning and navigating the ships with crews who were their own private employees, "was not in these circumstances [of the retroactive provision of the Clarification Act] enough to deprive seamen of that remedy" to elect to proceed against government agents whom the majority regarded as still "operating agents" (328 U. S. at 731, 732). That a contrary result might be required in the future by virtue of the forward-looking provisions of the Clarification Act was emphasized, the opinion cautioning, "Whether or not this conserving intent was made effective in the prospectively oper-

[14] To which type of demise the opinion refers as "the standard agreement" is not clear. The operating agency agreements of 1937 involved in *Brady* v. *Roosevelt SS. Co.*, 317 U. S. 575; *Quinn* v. *Southgate Nelson Co.*, 121 F. 2d 190 (C. A. 2), certiorari denied, 314 U. S. 682, and *Odgaard* v. *Cosmopolitan Shipping Co.*, 171 Misc. 244, were not standard forms but special forms in effect with only four companies, and had been discontinued in 1940. See letter of General Counsel, United States Maritime Commission, Appendix, *infra*, pp. 143, 155–161. The standard form which the wartime G.A.A 4–4–42 general agency agreement replaced was the so-called "1-cent bareboat charters" to private operators. H. Merchant Marine and Fisheries Committee Document No. 4, 1945, *Compilation of Standard Contracts Forms of the War Shipping Administration*, pp. 124–137; and see *ibid.*, footnote 11, p. 330. See *infra*, pp. 50–52, 57–61.

ating provisions of the Act, it is made clear beyond question in the retroactive ones" (332 U. S. at 733).

Mr. Justice Douglas, with whom Mr. Justice Black joined, filed a concurring opinion. They were not prepared to go so far as to hold that Moore-McCormack was in all respects an operating agent, apparently because of the absence from the wartime standard form of GAA 4–1–42 agreement of any language importing demise of the vessel to the agent, which is essential to the creation of an operating agency. Their separate concurring opinion adds "a few words to indicate that the result we have reached is consonant with the traditional rules of liability" (328 U. S. at 734); "There was no demise," they conclude, "But the form of the agreement is not important if the functions of the operator were those of an owner *pro hac vice,*" which "is the true condition which existed here" (328 U. S. at 738)

The effect of the *Hust* case was thus to establish that (a) in cases arising prior to the Clarification Act, one who is (b) an operating agent or an owner *pro hac vice* of a government-owned and operated vessel is liable under either the Jones Act or the general maritime law to (c) a seaman serving the vessel.

Justices Reed, Frankfurter, and Burton dissented. Analyzing the GAA 4–1–42 agreement in detail, they concluded that the general agent was not created operating agent of the Govern-

ment's vessels, but was employed only to act in respect of certain business not connected with their navigation and physical management, while the United States continued as operating owner in exclusive possession and control of the vessels themselves (328 U. S. at 747–748). Suit against the United States, they said, was the exclusive remedy of government employees serving as seamen on War Shipping Administration vessels where negligence of the master and crew was involved. "What the Clarification Act does and what it obviously was intended to do," they declared, "was to continue the policy of requiring seamen who were employees of the United States to continue to vindicate these rights through the Suits in Admiralty Act" (328 U. S. at 748).

In *Caldarola* v. *Eckert*, 332 U. S. 155, a majority of five Justices, over the dissent of the four Justices who were the majority in *Hust*, held, on a more complete record, that an employee of a stevedoring contractor of the United States, serving on a government-owned vessel operated by the War Shipping Administration, could not recover, under the law of New York, against the Government's general agent for the vessel. The Court's opinion, by Justice Frankfurter, rejected any construction of the GAA 4–4–42 agreement which would make the general agents even owners *pro hac vice* (much less full operating agents) of government-owned and operated vessels in time of war (332 U. S. at 158–159), and expressly held the agents not to be in "possession and control" of the vessel (332 U. S. at 158).

Moreover, in the view of the majority, neither the *Hust* case nor *Brady* v. *Roosevelt SS. Co.*, 317 U. S. 575, established that government agents were liable for the negligence of the masters and crews by whom the United States navigated and operated its vessels. It was emphasized that those cases established only that government agents were not immune from liability for their *own* torts and suit could be brought freely against them. The *Hust* case held only "that under the Agency contract the Agent was the 'employer' of an injured seaman as that term is used in the Jones Act, and a seaman could therefore *bring* the statutory action against such an 'employer'" (332 U. S. at 159, emphasis supplied). "The Court did not hold that the Agency contract made the Agent for all practical purposes the owner of the vessel. It did not hold that it imposed upon him, as a matter of federal law, duties of care to third persons, more particularly to a stevedore under employment of a concern unloading the vessel pursuant to a contract with the United States." Similarly, the *Brady* case "did not reach the 'different question' whether 'a cause of action' against the Agent had been established" (332 U. S. at 159–160).[14a]

The effect of the *Calderola* case was thus to establish that (a) in cases where the Clarification Act does not apply, one who is (b) not an owner

[14a] A petition for rehearing, based on WSA's practice of using "delivery" certificates to evidence the beginning and end of the agent's period of accountability, was denied. See *infra*, p. 57, fn. 24.

pro hac vice of a Government-owned and operated vessel is not liable, at least under the law of New York, to (c) a longshoreman serving the vessel. Although the particular individual involved was a privately employed longshoreman, the opinion contains no suggestion that the case of a civil-service crew member, such as had been involved in *Hust*, was distinguishable. All third persons—whether crew members, passengers, longshoremen, shippers, or even owners of vessels and shore structures injured by collision—appear to have been lumped together by the *Caldarola* decision, insofar as the general agent's liability is concerned, just as they would have been by the *Hust* case. Certainly the rationale of the *Caldarola* case is even more applicable where a crew member instead of a longshoreman is the plaintiff. Maintenance of a suit against the agent by a civil-service crew member must result in the same "consequences, to both the national and international interests of the United States," and will raise the same "serious issues affecting the immunity of Government vessels in foreign ports as well as immunity from regulation and taxation by local governments" as occur in the case of a suit by a privately employed longshoreman (332 U. S. at 159). Indeed, so far as concerns the necessity for secret proceedings before a judge *in camera*, as in admiralty in wartime, the danger of disclosing matters affecting the national defense in the course of

a jury trial is far greater in a crew member's action. The facts involved in a longshoreman's injury commonly occur in port; those involving a crew member are usually on the high seas or in foreign ports, and special defense installations, convoy routing instructions, and other secret defense procedures are commonly involved.

The four Justices who constituted the majority in *Hust* dissented from the *Caldarola* decision, Justices Douglas, Black and Murphy reaffirming the position in that case that the Government's agents were, at least, owners *pro hac vice* (332 U. S. at 160). Justice Rutledge, in a separate dissenting opinion, took the position that in the circumstances the negligence was that of the agent (332 U. S. at 161) and that there was no good reason not to impose liability upon the agent, "in view of the scope of the indemnity provided" by the United States (332 U. S. at 167).

We believe that the combined effect of the *Hust* and *Caldarola* cases is thus to establish that, in cases where the retroactive provision of the Clarification Act does not apply, general agents under GAA 4–4–42 agreements are subject to individual liability only for the torts of their own employees; all injured third parties may sue these agents for such torts under the general law and, if seamen, may bring suit against them under the Jones Act as well. But general agents are not owners *pro hac vice* of the vessels which the United States

operates nor liable for the negligence of the civil-service masters and crews with which the Government mans, navigates and physically operates its vessels.[15] This conclusion seems to us to be required by the rationale of the *Caldarola* decision. We submit that if there is any implication of the *Hust* opinion which is inconsistent with this view, it has already been authoritatively rejected by the later case and no longer governs.

Respondent's claim arose after the enactment of the Clarification Act, and is founded upon the alleged negligence of the shipmaster and of shoreside agents other than petitioner. It follows, under this Court's controlling decisions, that he—a government seaman—cannot hold petitioner—a general agent under a GAA 4-4-42 contract—liable for his injuries.

* * * * *

In our view, as this Point indicates, the *Caldarola* case is decisive, and the Court need not look beyond that decision for the answer to the question presented in these "general agency" cases. However, since the issue has been much mooted and there have been serious differences among the Justices, the remainder of our argument will go behind the decided cases to show.

[15] There can be no question, as we demonstrate in Point IV, that a general agent without possession and control of the vessel, and which is not an operating agent or owner *pro hac vice*, cannot be held liable for the negligence or misconduct of master or crew.

the correctness of the basis of the *Caldarola* holding, and also to point out the additional grounding for petitioner's contentions furnished by the prospective provisions of the Clarification Act.

III

THE UNITED STATES, AND NOT ITS AGENTS, WAS THE OPERATING OWNER IN EXCLUSIVE POSSESSION AND CONTROL OF ITS VESSELS; AND ITS AGENTS, SUCH AS PETITIONER, WERE SOLELY SHORESIDE BUSINESS AGENTS

A survey of the duties and functions of general agents, such as petitioner here, proves the entire correctness of the holding in *Caldarola* that these agents were not in possession and control of the vessels nor owners of the vessels *pro hac vice* (332 U. S. at 158–9).

1. *Introduction and summary.*—The ships' husbands or general agents of the Government, employed under the wartime standard form GAA 4–4–42 agreement, were strictly confined by the Government to operating the accounting and certain other shoreside business of the government vessels assigned to them.[10] The general agent performed the duties of storing and supplying the ship, but all purchases by it were made in the name of the United States and most were

[10] These matters were common knowledge in the trade and are explained in detail in the letter of the General Counsel of the United States Maritime Commission, submitted in response to the inquiries of this Court in *Caldarola* v. *Eckert*, No. 625, October Term, 1946, Appendix B, *infra*, pp. 142–170.

merely ordered under the preexisting master contracts made by the War Shipping Administration. Sales tax was not payable since the purchases were in law made by the United States. The agent, like all ships' husbands from classic times, "procured" the crew. That is, it ordered the crew from the union hiring halls on requisition of the master as directed by the War Shipping Administration, or if the union could not supply the men, called on War Shipping Administration's Recruitment and Manning Organization. The men were hired by the master who was an independent agent and employee of the United States. The general agent had nothing to do with determining in what service the vessel would be employed or where it would go. Usually such information was secret and the agent learned it only from the master when the voyage had ended.

The general agent gave the master no instructions as to how to navigate the vessel. These were given him in convoy conferences or in sealed envelopes forwarded by the War Shipping Administration. The agent gave the master no independent instructions as to the management of the vessel. All such instructions came from the War Shipping Administration in the form of written regulations, bulletins, directives, and instructions which the agent was required to pass on to the master or masters of vessels allocated to it for husbanding. The general agent as such had

nothing to do with loading cargo or its solicitation, the collection of freight, or the arrangements for wharfage and towage. These matters were the responsibility of the master on the one hand and the berth agent on the other, unless the general agent was given orders by the War Shipping Administration to perform berth agent duties for the vessel as well as the husbanding duties.

When the vessel reached foreign ports the general agent ordinarily had nothing to do with her. Even the husbanding duties she might require were performed by the berth agent, if in the United Kingdom, or by the Army or the War Shipping Administration itself if elsewhere. When the vessel returned to the United States the general agent's duties had to do primarily with accounting, pay rolls, and reports. It assisted the master and purser in making up the pay roll and obtained the money from the special deposit bank account maintained by the War Shipping Administration for the agent to use in performing its fiscal duties. If repairs were requisitioned by the master and chief engineer, the general agent arranged for them under preexisting master contracts made by the War Shipping Administration if amounting to less than $10,000, or requested special instructions from the War Shipping Administration if the total exceeded $10,000. During certain periods in certain ports, even this amount was reduced for purposes of closer control by the War Shipping Administration.

At no time did the work of the general agent extend to operating the vessel. It did not man, navigate, manage, or control the vessel. Its authority stopped at the water's edge and its agency was general in name only. In short, the United States remained the operating owner in exclusive possession and control of its vessels.

As we show in Point IV, in private shipping operations an agent thus lacking control of the work would clearly not be liable to third persons—whether they were seamen, longshoremen, passengers, shippers, or the owners of vessels and wharves damaged by the vessel—for the negligence of the master and crew in the navigation and management of the vessel. We submit that analyses of the background which in 1942 resulted in government operation, of the War Shipping Administration's arangements with the unions and others regarding crewing the vessels, of the terms of the GAA 4-4-42 (general agency) agreement, of the pertinent operations regulations of WSA, and of the recognition and approval accorded by Congress to the acts of WSA, all confirm the conclusion that the government's general agents were solely shoreside business agents for the Government, and that the same rule should be applied to them as to other similar husbanding agents for private principals.

2. *The background of the change-over in 1942, from bareboat chartered private operation to direct government operation, establishes that the*

United States and not the agents was operating the vessels.—At the time War Shipping Administration took control of the merchant fleet in February and March 1942, there were some 55,000 seamen employed in the off-shore trades, manning approximately 1,375 vessels, totaling 12,000,000 deadweight tons. Less than 10 percent of these vessels were government-owned and even those were privately operated under the Maritime Commission's system of so-called "one-cent bareboat charters" (*infra* pp. 51–52) and manned by seamen all of whom were privately employed. On VJ-day in August 1945, there were over 220,000 seamen manning some 4,300 vessels, totaling over 45,600,000 deadweight tons. As a result of the sinkings and the Maritime Commission shipbuilding program, the percentages had become reversed, and all but 10 percent of the vessels were owned and operated by the War Shipping Administration and were manned by seamen who were civil-service employees of the United States. This vast expansion was more than accounted for by the Maritime Commission's building program under which 5,220 ships were built.[17] These newly constructed vessels were owned by the United States and they were manned and operated by WSA. They were built for war use. Accordingly, title was retained by the United States.

[17] The difference is represented by sinkings and by vessels of merchant-type assigned for operation by the armed services.

They were allocated to existing shipping companies in accordance with the GAA 4–4–42 husbanding agreement, as the older government-owned vessels and the requisitioned ships had been.

In the history of this change-over, from private operation by private shipping organizations with privately employed masters and crews, to direct government operation in aid of the military forces, but with civilian government-employed crews, lies the key to the legal problems presented by the general agency cases. For many years the Government has been engaged, in peace and in war, in the ownership of a fleet of cargo vessels. But its wartime operations have followed a pattern entirely distinct from those followed in peacetime.

During World War I the Government's vessels were directly operated by the United States Shipping Board. With the return of peace, however, direct government operation ceased and the vessels were turned over to operating agents who were owners *pro hac vice* in possession and control of the Government's vessels. See *U. S. Shipping Board Emergency Fleet Corp.* v. *Greenwald*, 16 F. 2d 948, 951 (C. A. 2); *Stewart* v. *U. S. Shipping Board Emergency Fleet Corp.*, 7 F. 2d 676, 678 (E. D. N. Y.). Finally, the Merchant Marine Act, 1936, directed the United States Maritime Commission to arrange for the operation of its vessels by bare-boat charter to private operators. In both these demise agency and demise charter types

of operation, the private operators were owners *pro hac vice* or operating owners in possession and control of the vessels, employing their own masters, crews, and berth agents. The United States was a mere reversionary "general owner" which had divested itself of possession and control.

In order to assure operation of ship lines in trades, which, while unprofitable, were deemed essential, the Merchant Marine Act, 1936, provided that if it should be impossible to find private operators willing to operate the vessels under bareboat charter, the Commission temporarily might arrange for their operation under whatever arrangements it should find advantageous (46 U. S. C. 1194, 1197 (c)). Under this authority, the Commission adopted the special demise form of operating agency, employed from 1937 to 1940, which was involved in the cases of *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575; *Quinn* v. *Southgate Nelson Corp.*, 121 F. 2d 190 (C. A. 2), certiorari denied, 314 U. S. 682; and *Odgaard* v. *Cosmopolitan Shipping Co.*, 171 Misc. 244. This exceptional form of agreement, generally referred to as the "Roosevelt agreement" from the case of that name, was executed with only four agents.[18] It was a true operating agency agreement, under which the vessels were demised to the four agents as operating owners in posses-

[18] The agreement appears in the record of the *Brady* case, No. 269, October Term, 1942, pp. 21–32. It is summarized in the opinion, 317 U. S. at 576, n. 1.

sion and control, to man, victual, supply and navigate the vessels with masters and crews of their own selection. This method of private operation continued until the sale in 1940 of the last of the government-owned shipping lines. Thereafter, all government-owned cargo vessels were operated exclusively by private operators, to whom they were demised under bareboat charters, until the resumption in the spring of 1942 of the direct government operation by the War Shipping Administration with which we are here concerned.

As the national emergency deepened in 1941, the need of government control of the merchant fleet became evident. For the ordinary forms of bareboat charter of government vessels theretofore in use, the Maritime Commission substituted the "one-cent bareboat charters," whereby the private operators of the government-owned vessels were required to make only such voyages as directed by the United States and to give preference to such cargoes as the Government might require.[19] To extend government control to that

[19] Under this form of charter (H. Merchant Marine and Fisheries Committee, Doc. No. 4, 1945, *Compilation of Standard Contract Forms of the War Shipping Administration*, pp. 125 *et seq.*), which was involved in *Carroll* v. *United States*, 133 F. 2d 690 (C. A. 2), and *McCormick* v. *Moore-McCormack Lines*, 54 Supp. 399 (E. D. Pa.), the vesels were operated for the private account of the charterer, who agreed to operate the vessels in certain trade routes, and to pay the United States a nominal basic charter hire and additional charter hire in such amount as the aggregate net profits per

part of the merchant fleet which was privately owned as well as privately operated, the Ship Warrant Act (55 Stat. 591, as amended; 56 Stat. 370), effective in September 1941, was enacted. This provided, through allocation of repair and supply facilities, a degree of compulsion upon private owners not dissimilar to that already being exercised in the case of government-owned vessels under the one-cent bareboat charters. This assumption of government control did not, however, affect the private employment contracts with crew members.

In February 1942, it became obvious that mere control of the vessels was inadequate and direct government operation was required. The War Shipping Administration was organized, the one-cent bareboat charters terminated.[49] Gradually, between April 1942 and November 1943, substantially all ocean-going cargo vessels were requisitioned either for title or for use on a bareboat basis. The requisitioned vessels, like the government-owned vessels, were thenceforward directly operated by the Government with government-

month exceeded an amount equal to one cent per bale cubic foot of the vessels' underdeck bale cubic capacities. The United States also entered into a so-called Preference Agreement with each company, whereby it reserved the space of the vessels and provided for the payment of freight for the space reserved.

[49] Pursuant to the policy announced in Press Release 1171 (WA), issued February 25, 1942, the Administrator of the War Shipping Administration, by his telegram of March 22, 1942,

employed crews and allocated to general agents for husbanding.

3. *The distribution of the various operating duties between the shipmasters, the general agents, and the berth agents, as compared with their unified exercise by the agent under the former agreements, establishes that the United States and not the agents was operating the vessels.*— In conducting these wartime direct operations of its vessels, the United States, like other ship operators, made use of the three coordinate classes of agents usual in the conduct of the shipping business—the shipmaster, the ships' husband or general agent, and the consignee of the ship or berth agent—each responsible directly to the United States as operating owner in possession and control for the matters with which it was respectively entrusted, and none of them exer-

advised the companies operating under one-cent bare-boat charters that he had decided to cancel all such charters and to substitute therefor a General Agency Service Agreement. In that telegram the Administrator stated that allocations of vessels, made subsequent to February 25, 1942, under one-cent bare-boat charters were canceled as of the date of the allocation; as to earlier allocations, the companies were offered the option of making the cancellation of the bare-boat charter effective (a) retroactively to the inception of the bare-boat charter, or (b) retroactively to the commencement of any voyage thereunder, or (c) the earliest termination date permissible under the terms of the bare-boat charter. By operation of Article 20 and Exhibit A of the GAA 4-4-42, the one-cent bare-boat charters and Preference Agreements were canceled and the GAA 4-4-42 substituted therefor in accordance with the option exercised by the company. See *infra*, pp. 84-85.

cising control or authority over the others.[21] The United States employed experienced shipmasters as its agents afloat for the physical operation and management of its vessels, and experienced shipping operators as its agents ashore both as "general agents" to "husband" its ships, or operate their accounting and other business, and as "berth agents" to manage the operations of obtaining and discharging cargo and other port services.

The shipmasters and their crews were expressly made civil-service employees of the United States, in the unclassified and excepted service covered by Schedule A of the Civil Service Rules.[22] The masters' employment was without any special written contract in accordance with the terms of the customary maritime usages and the general maritime law. (See 2 Parsons, *Shipping* (1869),

[21] The classical exposition of the coordinate functions of shipmasters and ships' husbands has always been that of Justice Story, which continues to be substantially accurate to this day. Story, *Agency* (9th ed. 1882), § 35, Ships' husbands, § 36, Masters of Ships. Berth agents are to some extent a later development. In Story's day vessels did not operate on routes or schedules, and obtaining and delivering cargo, if not left to the master, was entrusted to another agent afloat—the supercargo. Today a port agent is necessary to look after the cargo at the berth and perform related duties.

[22] Civil Service Rules, Schedule A, sec. xxi (1), 5 Code of Fed. Regs., 1943 Cum. Supp., p. 1488, sec. 50.21 (Executive Order No. 9004, 7 F. R. 2, Executive Order No. 9054, 7 F. R. 837), established by the President under authority of Revised Statutes 1753 (5 U. S. C. 631); see also, War Shipping Administration Operations Regulations No. 12, Supplement 1, Appendix A, *infra*, p. 140.

pp. 3–13; Bouvier, *Law Dictionary* (1934), "Master of a Ship".) They accordingly had physical possession, custody and control of the vessels afloat, as the direct representatives of the United States as their operating owner. They had, in accordance with the law maritime and under the GAA 4–4–42 agreement, the exclusive authority to employ and discharge seamen on behalf of, and subject to, general instructions from the Government as operating owner. *Butler* v. *Boston & Savannah S. S. Co.*, 130 U. S. 527, 554; *Farrel* v. *McClea*, 1 Dallas 392, 393; *Hughes* v. *Southern Pacific Co.*, 274 Fed. 876 (S. D. N. Y.); see *infra*, pp. 63–66.

The shipping operators engaged by the United States as ships' husbands were also employed on terms which were substantially in accord with maritime custom (see Story, *Agency*, § 35; Bouvier *Law Dictionary* (1934), "Ship's Husband"), but were more fully prescribed in operations regulations as well as in the standard form GAA 4–4–42 husbanding agreement. Similarly, the operators engaged as berth agents and sub-agents were employed on terms substantially the same as in private shipping operations and were more fully described in the standard form of berth agency agreement.[2]

[2] The definitions of the duties of these agents are as follows:

"*General Agents defined.* A General Agent is one who takes care of the vessel's business on behalf of the War Shipping Administration, under a standard form of service agreement (GAA 4–4–42), appoints Agents as directed by the

This division of the shoreside duties between the general agent and berth agent for government vessels makes it abundantly plain that on neither of them did the United States confer the operating ownership or possession and control of its vessels. The duties of both these shoreside agents and the method of operation are fully explained in the letter of the General Counsel, U. S. Maritime Commission.

War Shipping Administration to handle those functions which relate to the handling of the cargo and functions incidental thereto, and assumes those duties when not otherwise instructed, obtains all accounting for all revenue and expenses and accounts to the War Shipping Administration for all business of the vessel" (G. O. 12, June 12, 1942; 7 F. R. 4496, 46 CFR, 1943 Cum. Supp., p. 11417).

"(a) *Berth sub-agent.* A berth sub-agent is an operator of United States flag vessels who is recognized by the War Shipping Administration as a regular berth operator in a certain service, and who has been designated by the War Shipping Administration as eligible for appointment by an Agent or General Agent as a sub-agent to perform such services of the Agent or General Agent as may be agreed upon for a vessel while it is operated in the regular service of the berth operator" (G. O. 12, Supp. 4, June 22, 1942, as amended by Supp. 7, Sept. 22, 1942; 7 F. R. 4741, 7561, 46 CFR, 1943 Cum. Supp., p. 11417).

Berth agents do not appear to have been specifically defined. "*Berth Agent Service Agreement (BA).* (a) Unless otherwise determined by the Administrator, when a vessel assigned to an Agent or General agent is required for operation in a service in which another operator is recognized by the War Shipping Administration as a regular berth operator, or as being otherwise qualified to operate in such service, such operator will be designated by the War Shipping Administration as the berth agent of the United States to operate the vessel in such service" (G. O. 21, Supp. 4, Dec. 29, 1943; 8 F. R. 17512, 46 CFR, 1943 Supps., p. 2113).

(Appendix B, *infra*, pp. 153–156, 162–169). Their coordinate and correlative functions show plainly that only the Government, as principal of all three agents—shipmaster, ship's husband, and berth agent—was the operating owner in possession and control of its ship.

Nowhere in the GAA 4–4–42 general agency agreement is there found any language amounting to a demise or delivery of the physical possession and control of the vessels to the general agent any more than to the berth agent, despite ineffectual arguments to the contrary.[24] The agent is a mere

[24] Counsel for third parties in substantially every case including *Calderola* (Pet. for rehearing (No. 625, October Term, 1946), pp. 23–25) have relied heavily upon War Shipping Administration's practice of using delivery certificates covering the assignment of vessels to agents under the GAA 4–4–42 agreement in the same basic form and employing similar language to those used for years to cover deliveries under bareboat charters. This, they assert, shows that possession and control is transferred to general agents the same as to bareboat charterers.

But such use of the terms "delivered" and "redelivered" equally accords with commercial usage in respect of mere contracts of affreightment, such as time and voyage charters, where only the right to have a cargo transported is conferred upon the party to whom the vessel is said to be "delivered", and where all that is meant is that the vessel is made available for loading under the directions of the owner's shipmaster. The language is not inadvisedly used, for it is specifically stated that the vessel is "delivered by War Shipping Administration" to the named agent "under the terms and conditions of Service Agreement Form GAA 4–4–42." As was observed in *Palardy* v. *American-Hawaiian S. S. Co.*, 169 F. 2d 619, 621 (C. A. 3), now pending on petition for a writ of certiorari, No. 186, Misc., this Term, "The use of the

operator of certain aspects of the ship's shoreside "business." The agreement, as we shall show, makes it plain that the master, as the direct agent and employee of the United States as operating owner, is in possession of the ship to the exclusion of the general agent. As pointed out by the General Counsel, U. S. Maritime Commission (Appendix B, *infra*, pp. 156–161), there is thus a striking and critical difference in the wartime standard form of general agency agreement here involved and the peacetime operating agency involved in *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575; *Quinn* v. *Southgate Nelson Corp.*, 121 F. 2d 190 (C. A. 2), certiorari denied, 314 U. S. 682, and *Odgaard* v. *Cosmopolitan Shipping Co.*, 1939, 171 Misc. 244.

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words 'delivered' and 'redelivered,' read in the light of the express reference to the general agency service agreement must, therefore, refer to the beginning and end of the agent's responsibility for maintaining the vessel and providing it with necessary stores and equipment."

In private operation it is essential to the creation of an operating agent or owner *pro hac vice* that he be placed in exclusive possession, command and control of the ship (see *infra*, pp. 102–109). Loose expressions concerning "delivery" and "redelivery" of the vessel are not effective to create a demise or impose liability for negligence of the master and crew. *Clyde Commercial S. S. Co.* v. *West India S. S. Co.*, 169 Fed. 275, 277 (C. A. 2); *The Volund*, 181 Fed. 643, 665–667 (C. A. 2); *Adams* v. *Homeyer*, 45 Mo. 545, 551–552. "These terms are more readily reconcilable with the idea of their employment with reference to the commencement and termination of the charter party than that they portend a transfer of the possession, control, and management of the ship from one party to the other." *Grimberg* v. *Columbia Packers' Assn.*, 47 Ore. 257, 270–271, 83 Pac. 194, 199.

By the Roosevelt operating agreement the United States demised the vessels themselves to a cost-plus contractor designated "Managing Agent" *to be operated* by it as owner *pro hac vice*. The latter, and not the United States, manned the vessel with a master and crew employed as its private agent and employees, the Government retaining only a limited veto power over the officers employed by the contractor. Thus, for example, the Roosevelt agreement (see record in *Brady* v. *Roosevelt S. S. Co.*, No. 269, October Term, 1942, pp. 21–32) stated: "The Managing Agent has indicated its willingness to undertake the management and *operation* of the Line" (Art. 1); "The Managing Agent *shall manage and operate* the said vessels exclusively under the trade name American Pioneer Line" (Art. 4); "The Managing Agent agrees to *man, equip, victual, supply and operate* the vessels, subject to such restrictions and in such manner as the Owner may prescribe * * *. The Licensed Officers and Chief Steward, however, are to be subject to the approval of the Owner" (Art. 7); "The Owner may terminate this agreement * * * in case of * * * any assignment, transfer, agreement or arrangement whereby the *management or operation* of the above described Line or vessels shall be divested from the Managing Agent" (Art. 25).

[25] Throughout this brief, all italics in quotations are supplied, unless otherwise indicated.

By the GAA 4-4-42 husbanding agreement, on the other hand, the United States retained navigation and management of the vessels for itself and employed private operators, including berth agents as well as general agents, only to operate certain parts of the vessels' business. Thus the general agent is employed by the United States "as its agent and not as an independent contractor, to manage and conduct *the business* of vessels assigned to it" (Art. 1). The general agent agrees to conduct the business of the vessels "for the United States, *in accordance with such directions*, orders, or regulations" as the United States may prescribe (Art. 2). The general agent undertakes to "maintain the vessel in such trade or service as the United States may direct" (Art. 3 A (a)); to "equip, victual, supply and maintain the vessels *subject to such directions*, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe". (Art. 3 A (c)); to "arrange for the repair of the vessels * * * including maintenance and voyage repairs and replacements" and to "exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels" (Art. 14). The general agent is to "*procure* the master of the vessels operated hereunder, subject to the approval of the United States" who, when employed, shall be "an agent and employee of the United States, and shall

have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel", and shall engage for the Government the officers and men required to fill the complement of the vessel who "shall be subject only to the orders of the master"—not of the shoreside agent (Art. 3 A (d)).

The whole arrangement of distribution of duties between the several types of independent agents discloses the Government's abiding purpose that the general agents should not be "operating agents" as in the *Brady*, *Quinn*, and *Odgaard* cases, *supra*, but should be ships' husbands whose authority stops at the water's edge and who are to operate only the "business" of the vessels and have no part in their manning, navigation, or physical management. Had it not been thought indispensable in wartime to terminate the status of the private operators as owners *pro hac vice*, the War Shipping Administration would not have replaced the private bareboat chartered operation by direct government operation.

4. *The procedure for manning War Shipping Administration vessels establishes that the United States and not its agents was the operating owner in exclusive possession and control.*—Consideration of the procedure for procuring and employing the civil-service masters and crews with which the War Shipping Administration manned its vessels likewise makes it plain that general agents were not operating agents employing the seamen, and

had no authority or control over the masters and crews of the Government's vessels, but were only ships' husbands or operators of certain aspects of the vessels' shoreside "business."[26]

Article 3 A(d) of the GAA 4-4-42 agreement (fn. 5, *supra* pp. 6-7) specifically provided that the master should be the agent and employee of the United States and that the crew, although procured through customary channels, should be employed by the United States. The relation of principal and agent thus extended from the War Shipping Administration through the master to the crew who, as a consequence, were employees of the United States.

In accordance with the immemorial custom

[26] Even if, as a result of their duty as ships' husbands to "procure" seamen for engagement by the masters on behalf of the United States, such crew members may be deemed "employees" of the agents for the purpose of bringing suit under the Jones Act, *Hust* v. *Moore-McCormack*, 328 U. S. 707 is not dispositive of the question of liability here because on the record there the agent was held to by an "operating agent" or owner *pro hac vice*, who would of course be liable for the torts of the master and crew, while the *Caldarola* case now holds that the agent is not such an owner *pro hac vice* (332 U. S. at 159). See *Shilman* v. *United States et al.*, 164 F. 2d 649, 652 (C. A. 2), certiorari denied, 333 U. S. 837. It is settled that an agent procuring the employment of others in such a manner is not responsible for the torts or contracts resulting from their acts. See *Restatement of Agency* (sec. 79, Comment (a)): "The agents so employed are the agents of the principal and not of the employing agent, who is not responsible to them for their compensation unless he so manifests, and is no more responsible for their conduct to third persons or to the principal than he for the conduct of other agents of the principal, unless he is negligent in their selection." See, *supra*, pp. 36, 40-43; *infra*, pp. 105-6, 112-13.

touching ships' husbands, Article 3 A (d) of GAA 4–4–42 directs the agent to "*procure* the master of the vessels operated hereunder, subject to the approval of the United States.". It thus makes plain that the agent may not supply a master employed by it, nor may it act as operating agent of the vessels. The agent is confined to *procuring* a master for acceptance or rejection by the United States as employer. The agreement directs that the master so procured shall be an "agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel." Thus it emphasizes that the agent may not itself give any orders whatsoever with respect to the navigation and management of the vessel to the master, who is declared to be an agent of the United States subject only to independent government orders with respect to these matters. Such orders as the agent may appear to give, in fact it merely passes on after receiving from the War Shipping Administration.

The Agreement further directs that the general agent "shall *procure and make available* to the Master *for engagement by him* the officers and men required *by him* to fill the complement of the vessel." The GAA 4–4–42 agreement thus denies the agent authority even to employ officers or men on behalf of the Government. The function of employing a crew for the United States is thus vested exclusively in the master as an independent agent of the Government. Respecting the method

of procurement, the agreement directs "Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time." Again, the GAA 4–4–42 agreement emphasizes that the agent's authority is to stop at the water's edge and prohibits the agent from interfering with the management of the vessel itself by requiring that "the officers and members of the crew shall be subject only to the orders of the Master." It concludes that the officers and crew "shall be paid *in the customary manner,*" that is to say, in cash, "with funds provided by the United States hereunder."

Reviewing the procedure for manning the vessels under GAA 4–4–42, we may state the steps in logical sequence as follows:

1. The master, once "procured" by the agent and employed by the United States, is the "agent and employee of the United States," not of the agent.

2. The crew is "procured" by the agent through the usual channels, that is to say, the union hiring halls, and is "made available" to the master "for engagement by him" as an independent agent of the United States, not for engagement by the agent.

3. The master "shall have and exercise full * * * authority" over the vessel's "navigation and management" and the officers and members of the crew are "subject only to the orders of the Master." The agent has no independent

authority to direct or control the master and crew; its authority ends at the shore.

4. The officers and crew are to be paid "in the customary manner with funds provided by the United States," that is to say, in cash by the master or his representative.

The arrangement thus effectuates the purpose that the agent merely "husbands" the vessels or "operates" their "business," but has no part in operating the vessels themselves. This is confirmed by the seamen's contract of employment. The crew members procured by the agents for employment by the master on behalf of the United States sign the statutory form of shipping articles before a United States Shipping Commissioner, like all merchant seamen, and the Commissioner must certify that they have read or have been told the contents of the articles (46 U. S. C. 564, 565, 713). The shipping articles constitute a contract executed by and between the master, as agent for the United States as operating owner of the vessel, and each member of the crew. See *Hughes* v. *Southern Pacific Co.*, 274 Fed. 876 (S. D. N. Y.). The form prescribed by statute requires that the name and address of the "Operating Company for this Voyage" or "Registered Owner or Manager" be expressly stated and a copy of the articles showing that information is "to be placed or posted up in such part of the vessel as to be accessible to the crew" (46 U. S. C. 577).[27]

[27] This is the document referred to as the "forecastle card" which is posted in the crew's quarters.

And in order that government seamen should be informed of their status, beyond any possible doubt, WSA required that the shipping articles should be filled out to state, in the space for the name of the registered owner or operating company for the voyage, "United States of America, War Shipping Administration," and in space for the address, "c/o XYZ Company, General Agent," giving the address of the agent (War Shipping Administration Operations Regulation No. 88 Revised). Moreover, all copies of the articles, including in particular that which is required by 46 U. S. C. 577 to be posted in the forecastle, are customarily imprinted with a rubber stamp advising members of the crew that they are not employees of the agents but exclusively employees of the United States through the War Shipping Administration. This stamp, in the case at bar, stated in large letters "YOU ARE BEING EMPLOYED BY THE UNITED STATES" (R. 606).[28]

Since the crew members so employed are unclassified civil-service employees of the United States (*supra*, pp. 6, 54), for all claims and causes of action arising prior to the Classification Act, the United

[28] In the companion case of *Gaynor* v. *Agwilines, Inc.*, No. 430, this Term, the stamp reads: "It is also agreed that the Master, Officers, and all other members of the crew are employees of the United States subject to the provisions of Public Law No. 17, of the 78th Congress, as amended, and are not employees of Agwilines, Inc., that all decisions, amendments and attachments of the Maritime War Emergency Board shall apply to and become a part of this agreement" (*Gaynor*, R. 38).

States Employees' Compensation Commission granted them benefits under the United States Employees' Compensation Act, 1916 (39 Stat. 742, 5 U. S. C. 751 *et seq.* See the Commission's 28th Annual Report (1944), p. 5; and its letter of July 31, 1942, H. Rept. 107, 78th Cong., 1st sess., at pp. 33–35). The Clarification Act substituted therefor the private seaman's rights to recover damages under the Jones Act and maintenance and cure under the federal maritime law. See Point V, *infra*.

Upon its creation on February 7, 1942, the War Shipping Administration devised this program of direct government operation with civil-service personnel. Thereafter, the privately owned 90 percent of the merchant fleet was requisitioned and the general agency plan for direct government operation of all government-owned vessels adopted as to those vessels, as well as the former government-owned cargo fleet, which had been converted from private operation under the one-cent bareboat charters. (See *supra*, pp. 51–52.) The wages and working conditions of the majority of the 55,000 merchant seamen, upon both government and privately owned vessels, were already established by collective bargaining agreements between the shipping companies operating the vessels and the maritime labor unions. Upon the adoption of the general agency scheme, the government-owned vessels were allocated to shipping operators already operating vessels bareboat-chartered to or privately owned by them. It was only natural that the sea-

men would desire that the wages, working conditions, and employment practices already established by collective bargaining for vessels privately operated should also obtain as to all vessels allocated to agents by WSA for husbanding under the GAA 4-4-42 agreements. Just as naturally, WSA desired to avoid the delay which would result from negotiating new collective bargaining agreements between the unions and itself as employer. To give effect to these desires, WSA in May and June 1942 signed the over-all collective bargaining arrangement known as the "Statements of Policy" with the nine principle maritime unions.[29]

The logic behind the Statements of Policy was formally to confirm to the seamen's organizations that in taking over the manning and physical operation of the government-owned cargo fleet with government employees, WSA proposed, none the less, that its crews should continue as civilians engaged in voluntary civilian employment, and that its operations, however closely allied to military and naval activities, were to continue as a civilian enterprise conducted with civilian government em-

[29] See *Fink*, No. 360, R. 188. Operations Regulation 1, May 25, 1942; Operations Regulation 1, Supplement 1, July 13, 1942; Operations Regulation 1, Supplement 3, August 6, 1942. The nine unions were: Sailors Union of the Pacific; Seafarer's International Union; Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association; Marine Cooks and Stewards Association; National Maritime Union; United Licensed Officers of U. S. A.; American Communications Association; National Organization of Masters, Mates and Pilots of America; National Marine Engineers' Beneficial Association.

ployees. Accordingly, the Statements of Policy: (1) declare that the intention of Article 3 A (d) of the general agency agreement is that agents will be required to procure officers and men in accordance with customary practices in order to make available the full supply of seamen and to avoid favoritism as between one agent and another with respect to preference of employment or the use of union hiring halls; (2) agree that the provisions of existing collective bargaining agreements with respect to wages and working conditions shall be continued and observed unless changed by mutual agreement between WSA and the unions; and (3) pledge the cooperation of the unions in (a) maintaining discipline, with special emphasis on upholding the authority of the master, (b) eliminating crews' mass meetings, subject to the recognition of spokesmen for each department of the ship, and (c) withholding the exercise of the seamen's right to strike.

The Statements of Policy were promptly implemented by a series of regulations and directives. General agents were instructed by Operations Regulation 1 and Supplements 1 and 3 thereof, to follow the policy outlined in the Statements of Policy. In order that the War Shipping Administration might be fully informed with respect to the agreements in effect, Supplement 2[30] directed general agents to forward copies of all of their collective bargaining agreements to WSA. General agents

[30] Issued July 13, 1942.

were further instructed by Supplement 4 [31] to follow the provisions contained in their collective bargaining agreements with respect to (1) the amendment of such agreements and (2) the settlement of disputes arising under them. It noted the distinction between (a) matters involving amendment, modification, or supplement of the agreements, covering such matters as increases in wages, which are outside the scope of subsisting agreements, and (b) matters involving only the clarification or interpretation of the provisions of subsisting agreements. General agents were (1) directed to obtain the approval of WSA upon amendments, modifications, or supplements of their agreements before placing them in effect, and (2) advised that WSA would consider itself committed by whatever determinations might be reached through the application of procedures specified in the agreements for the settlement of disputes over matters of clarification and interpretation.

Instructions were later issued, by Supplement 6, [32] to those general agents (1) who had agreements with unions not signatory to the Statements of Policy [33] and (2) who had no agreements with

[31] Issued August 15, 1942.

[32] Issued June 19, 1943.

[33] WSA has taken the position that the Statements of Policy constituted approval not only of the contracts of unions which were signatory thereto, but of all existing collective bargaining agreements between its general agents and seafaring unions. (Operations Regulation No. 1, Supplement No. 6, and memorandum of Assistant Deputy Administrator for Maritime Labor Relations, May 2, 1945.)

unions covering part or all of their seagoing personnel. Agents having such agreements were instructed nonetheless (1) to follow the grievance machinery therein provided for the settlement of disputes and (2) to obtain the approval of WSA upon amendments and modifications of agreements before putting them into effect on government vessels. Agents having no agreements at all were (1) authorized to negotiate agreements with a proper bargaining agent for an appropriate unit, (2) directed to obtain the approval of WSA upon such agreements before placing them in effect, and (3) instructed, in the absence of collective bargaining agreements, (a) to forward complete statements of their wage and manning scales and working rules, and (b) to submit for approval any changes in such wage and manning scales or working rules before putting such changes into effect. Supplement 6 also directed all general agents to forward without delay copies of all new agreements or proposed modifications not previously submitted. In particular, it was provided that the agents would act for WSA in negotiating future changes and new agreements which, in so far as they affected WSA seamen, "shall not be binding and effective as to such employees until all of the terms and provisions * * * shall have been approved by the War Shipping Administration." [34]

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[34] See *e. g.*, the collective bargaining agreement in the present case (R. 586, 603-604).

In connection with these collective bargaining arrangements between WSA and the maritime unions, one of the most important problems was the designation of the authorized collective bargaining representative for WSA seamen. Such seamen fell within the exclusion of employees of the United States from the coverage of the National Labor Relations Act. As a practical solution of this problem, the Administrator, through an exchange of correspondence with the National Labor Relations Board in October 1942 (*Fink*, No. 360, R. 43–57), exercised his power under Executive Order No. 9054, creating the War Shipping Administration, to utilize the facilities of the Board for the designation of bargaining units, while specifically reserving the Administration's rights in respect of the Board's absence of jurisdiction over personnel aboard WSA operated vessels. In consequence of this procedure and the Statements of Policy, government employees serving as seamen on WSA vessels enjoyed full exercise of the rights to organize and bargain collectively guaranteed by the National Labor Relations Act to persons privately employed.

This practical solution of the collective bargaining problem was expressly approved by the House Committee on Merchant Marine and Fisheries in reporting the bill which became the Clarification Act.[35] Pursuant to the arrangement between WSA

[35] H. Rept. 107, 78th Cong., 1st sess., pp. 23–24: "Suggestions have been made that the National Labor Relations Act

and the National Labor Relations Board, questions of representation among seamen employed on vessels husbanded by a general agent were referred to the Board for determination. The Board indicated the appropriate unit, and conducted elections to determine the bargaining representative, all in conformity with procedures identical with those regularly used by the Board under the National Labor Relations Act. Agreements for consent elections were signed in proper cases by the steamship company, as general agent for the WSA.

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be made applicable to seamen, not withstanding the fact that seamen employed by the Government would not be entitled to benefits under that act. The committee understands that it is the intention of the Administrator of the War Shipping Administration to avail himself of the facilities of the National Labor Relations Board for the purpose of aiding in the maintenance of collective bargaining processes and adjusting problems in such connection when consistent with the prime objective of a vigorous and successful prosecution of the war. Under the Executive order creating the War Shipping Administration, the Administrator has full authority to avail himself of such services, and in view of the expressed attitude in this connection, it seems unnecessary to consider further suggestions for making the National Labor Relations Act specifically applicable to seamen by statute.

"The Administrator's proposed solution to this problem would appear to assure seamen the substantial benefits of the National Labor Relations Act without infringing upon the well-established principles that the United States as an employer is not subject to the National Labor Relations Act. The Administrator could avoid subjecting disputes or other problems to the National Labor Relations Board in cases where this might interfere with the effective prosecution of his duties and functions. Accordingly, this solution of the problem seems to make legislative action unnecessary."

A similar practical arrangement was made in connection with the functioning of the National War Labor Board. General agents were directed from time to time, as occasion required, to comply with its procedures, orders and decisions in matters pertaining to both phases of its jurisdiction, *viz*, labor disputes and wage stabilization. Since all new collective bargaining agreements and all changes in subsisting agreements or employment practices required WSA's authorization and approval before being put into effect, the WSA made the submissions of all changes in wage rates, requesting the Board to notify directly the agents involved. WSA thus fully complied with the stabilization requirements relating to the wage structure of seamen, and the seamen had the right to invoke the dispute jurisdiction of the National War Labor Board as fully as if employed on privately operated vessels.[38]

[36] These practical arrangements in matters of collective bargaining and compensation were facilitated by the statutory definition of "employer" in the National Labor Relations and War Labor Acts. As stated by the War Labor Board in its Directive Order of August 31, 1945, *In re Maritime Cases*, 26 War Lab. Rep. 509, 512: "The question raised as to whether the operators should be named in the contract as employers, or, as in the last contract, as general agents for the War Shipping Administration has no real significance. Whatever the designation in the contract, the operators are the employers for the purposes of this dispute, as contemplated by the War Labor Disputes Act. * * *. Section 2 (d) of the War Labor Disputes Act * * * provides that the term 'employer' shall have the same meaning as in Sec. 2 of the National Labor Relations Act. The latter section

In like manner the WSA adhered, as a participating signatory employer, to the memorandum of agreement of December 18, 1941, designated "Statement of Principles" (46 C. F. R., 1943 Supp., p. 2124; 8 F. R. 3454), which created the Maritime War Emergency Board. This semi-official Board had earlier been appointed by the President, pursuant to an agreement between private shipping operators and the maritime unions, in order to deal with problems of wartime compensation and bonus which could no longer be adequately solved by the parties because of the restrictions of wartime secrecy. The War Labor Board advised the Maritime War Emergency Board that its bonus decisions need not be submitted to the former agency for stabilization review and the latter became thereby the final arbiter of all matters within its field of authority.

Not only the federal agencies, but the states as well have always recognized WSA seamen as employees of the United States, and the vessels as operated by the Government. With the exception of California, the authorities of all states which

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defines an employer as "any person acting in the interest of an employer, directly or indirectly * * *" [29 U. S. C. 152 (2)]. See, also, *In re Atlantic and Gulf Coast Agents of WSA*, 16 War Lab. Rep. 23, 24, 32–36; and cf. exchange of correspondence, 20 War Lab. Rep. at 465, 468. The solutions of the problems involved in the conversion from private to government operation were specifically examined and approved by Congress in connection with its consideration of the Clarification Act. H. Rept. No. 107, 78th Cong., 1st sess., pp. 15–17, 23–24, fn. 35, *supra*, pp. 72–3.

provide coverage for maritime workers in their unemployment compensation laws have not attempted to collect contributions with respect to seamen on vessels operated by WSA and husbanded by general agents, since "it is generally understood that * * * [such] workers * * * are considered to be Federal employees."[37]

5. *The precise terms of the general agency agreement, and the similarity of the duties of general agents to the other types of agents employed by the Government, establishes that the United States and not the agents was operating its vessels.*— Turning to the plain language of the provisions of the GAA 4-4-42 contract other than Article 3A (d) (which we have been mainly discussing), we submit there can be no question that the United States did not make the general agent operating agent or owner *pro hac vice* by the terms of that agreement. The contract throughout refers to the vessels as "operated hereunder", which means *operated by the United States* through WSA. Nowhere in the GAA 4-4-42 agreement is the vessel said to be operated by the agent, nor is the latter referred to as its "operator", as was done in the special Roosevelt form (*supra*, p. 59). On the contrary, the terms of GAA 4-4-42, which delimit the

[37] See *Issues in Social Security*, Report to the Ways and Means Committee of the House of Representatives by the Committee's Social Security Technical Staff pursuant to H. Res. 204, 79th Cong., 1st sess., p. 401; Hearings before the House Ways and Means Committee on H. R. 3736, 79th Cong., 1st sess., pp. 703–705.

agent's general duties and authority, are substantially identical with those of the berth agent and berth sub-agent agreements (BA 12–29–43 and BSA 9–22–42) as well as the time charter agent agreement (TCA 4–4–42).[38] The plain language of the several forms of agreement makes it obvious that each type of agent was equally confined to shoreside duties, and was employed exclusively to operate only certain parts of the "business" of the vessels assigned to the agent and not the vessels themselves. The agreements were designed for wartime operation of ships carrying primarily military cargo and sailing to secret destinations, wherever required, for logistic support of the armed forces. This necessitated direct operation by the Government and complete exclusion of the private companies from any part in the operation or control of the vessels themselves.

A comparative analysis of the GAA 4–4–42 agreement and the corresponding provisions of the other standard forms of wartime agency agreements (berth agent, berth sub-agent, time charter agent) demonstrates that the United States was operating owner in exclusive possession and control of its vessels and that general agents, no more than the other shoreside agents, were not permitted to act as op-

[38] The texts of the standard forms are published as follows: GAA 4–4–2, Title 46, Code of Fed. Regs., 1943 Cum. Supp., p. 11427 (7 Fed. Reg. 7562); TCA 4–4–42, *ibid.*, p. 11433 (7 Fed. Reg. 7565); BSA 9–22–42, *ibid.*, p. 11437 (7 Fed. Reg. 7567); BA 12–29–43, Title 46, Code of Fed. Regs., 1943 Supp., p. 2113 (8 Fed. Reg. 17512).

erating agents nor placed in possession of the vessels which the Government operated.

Article 1 of the general agency, time-charter agency, berth agency and berth sub-agency forms of agreements all are substantially identical. The agent is appointed as an agent, and not as an independent contractor, to manage and conduct for the United States the *business* of such vessels as may be assigned to it from time to time. The general agent, just like the berth agent and time-charter agent, is appointed to manage "the business," not to manage "the vessels."

Article 2 of the several forms of agreement is likewise substantially identical. The agent accepts the appointment and undertakes to manage and conduct "the business" of the vessels "in accordance with such directions, orders, or regulations" as the Government may prescribe.

Article 3 A (*a*) differs according to the type of agency agreement involved. In all forms except the BSA it provides that the agent shall "to the best of its ability" and subject to the orders of the United States "as to voyages, cargoes, priorities of cargoes, charters, rates of freight and other charges and as to all matters connected with the use of the vessels" perform the duties prescribed and, in the absence of orders, shall "follow reasonable commercial practices." In the general agency agreement, the duties prescribed are to "maintain the vessels in trade or such service as the United States may direct." The distribution of the performance

of the various shoreside functions of "husbanding" and "berthing" the vessel was prescribed in detail in WSA Operations Regulation No. 84 (Appendix C, *infra*, p. 171). The purpose and effect is explained in the letter of the General Counsel (Appendix B, *infra*, pp. 153–156, 162–169).

Article 3 A (b) (3 A (c) of BSA) is again substantially identical. General and other agents are alike required to collect all moneys due the United States under their agreement and "deposit, remit, or disburse the same in accordance with such regulations as the United States may prescribe from time to time," and to account for all moneys so collected or disbursed. In all forms this article is complemented by *Article 7*, referred to hereafter, which by defining what items are reimbursable to the various types of agents, indicates the kind of disbursements which each type of agent will be directed to make.

Article 3 A (c) of the GAA 4–4–42 agreement requires the agent "to equip, victual, supply and maintain the vessels," not in accordance with its independent judgment, but "subject to such directions, orders, regulations and methods of supervision and inspection" as the United States prescribes. This provision is complemented by *Article 14* of the GAA 4–4–42 agreement which provides that "unless otherwise instructed," the agent shall "*arrange* for the repair of the vessels." But in fact, as is well known, all maintenance and repairs were either effected or contracted for by the per-

sonnel of WSA's Maintenance and Repair Division in consultation with representatives of the agents. Actually no authority whatever was left to the agents.

Article 3 A (d) is the heart of the GAA 4-4-42 agreement but requires no further discussion (*supra*, pp. 61–76). *Article 3 A (e)* refers to bills of lading and is not material here. Nor are *Articles 4, 5 and 6*, providing that agents of the various types shall keep their accounts in the manner prescribed by the United States, shall be paid compensation in "such fair and reasonable amount as the Administrator, War Shipping Administration, shall from time to time determine," and may appoint subagents only subject to the approval of the Government.

Article 7 of the general agency, time charter agency, and berth agency and subagency forms of agreement contains the same basic provision that the United States shall reimburse the agent "for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required," subject to certain exceptions, "which are not directly and exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder." The GAA 4-4-42 agreement, in addition to these clauses common to all the forms, provides for reimbursement "to the extent not recovered from insurance" of "all crew expenditures" including without limitation "all disbursements for or on account of wages,

extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, maintenance, cure, vacation allowances, damages or compensation for death or personal injury or illness, and insurance premiums, required to be paid by law, custom, or by the terms of the ship's articles or labor agreements."

This provision for reimbursement is not a recognition of any personal responsibility of the agent for any of these items. It is nothing more than a description of the items which the agent will be required to disburse on behalf of the United States in accordance with Article 3A. Thus, judgments against the United States for wages, maintenance and cure, personal injuries, loss of personal effects or for any other cause of action arising out of the operation of WSA vessels do not have to be certified to the Treasury for appropriation, as is the case with vessels operated by the Army and Navy Departments. Such judgments and such claims against the United States, not reduced to judgment, are, in the case of WSA vessels, paid by the agent from the vessel's funds placed in his hands by WSA. It is the reimbursement of such payments which is provided for in Article 7. The circumstance that, by reason of the "unfounded claims" clause (Article 16, *infra*), payments can equally be made and reimbursed where claims and judgments are against the agent itself, provided the United States directs the agent to make such payment, does not give the provision effect as an ad-

mission that the agent is an "operating agent" in possession and control of the Government's vessels. In many instances, of course, reimbursement is not made by the United States, but by the underwriters on the protection and indemnity insurance for which the Government has contracted.

Article 8 of the general agency, time charter agency, and berth agency and subagency forms likewise contains identical basic clauses concerning indemnity and insurance. All forms provide that the United States shall without cost or expense to the agent procure or provide insurance against, or shall assume, "all insurable risks of whatsoever nature or kind relating to the vessels assigned hereunder" and shall defend, indemnify and save harmless the agents against "all loss, liability, damage and expense (including costs of court and reasonable attorneys' fees) on account of such risks and liabilities, to the extent not covered or not fully covered by insurance." The GAA 4-4-42 form differs only in adding a further provision expressly authorizing the United States to be a self-insurer with respect to everything except protection and indemnity riks. These provisions of Article 8 are complemented by *Article 16*, which, so far as here pertinent, is substantialy identical in the forms for every type of agency. It provides that the United States will indemnify and hold harmless the agents "against any and all claims and demands (including costs and reasonable attorneys' fees in defending such claim or demand, whether or not the claim or demand be found to be valid)" in connection

with "the operation or use of said vessels," or the performance by the agent of the duties provided by his contract, including "any and all claims and demands by passengers, troops, gun crews, crew members, shippers, third persons, or other vessels, and including but not limited to claims for damages for injury to or loss of property, cargo or personal effects, and claims for damages for personal injury or loss of life." The general agency form adds the words "and claims for maintenance and cure."

It seems clear that this insurance and indemnity afforded all types of agents against personal injury liability cannot be regarded as any evidence that, of all the agents thus indemnified, only the general agent was thought subject to some special liability, for the faults of others than its own independent employees, which liability normally would only exist if the general agent were an "operating agent." Nor can it be argued that such rights of indemnity redound to the benefit of third parties such as plaintiffs. *Twin Falls Canal Co.* v. *American Falls R. Dist. No. 2*, 59 F. 2d 19, 22 (C. A. 9), certiorari denied, 287 U. S. 638; *U. S. Shipping Board Merchant Fleet Corp.* v. *Dietrich*, 27 F. 2d 681, 683–684 (C. A. 2). Indeed, the GAA 4–4–42 provision for indemnity and insurance was obviously intended to cover cases where agents might be held liable for the actionable negligence of their own shoreside employees, not to extend such liability to cover negligence of the civil service masters and crews with whom the Government manned, navigated, and physically managed its vessels. As with the provision in Section 3 (j) of the Clarifica-

tion Act (57 Stat. 51), amending Section 3 (b) of the Act of June 6, 1941 (55 Stat. 244), so as to authorize the Government to insure the individual liabilities of agents (see 50 U.S. C. App. 1273 (b)), it was never contemplated that by undertaking to protect its agents against their undoubted personal liability for the actionable negligence of their own employees, the individual liability of government agents was to be deemed to be extended so as to cover equally the actionable negligence of those who were employees of the Government and not of the agents.

Articles 9 and 10, dealing with general average and salvage, are similar in the forms for all types of agency agreements. The agent is required to "comply fully with all instructions issued by the United States." The United States is to have complete control over salvage claims and awards. This is a significant provision of the GAA 4–4–42 agreement, showing that it is not an operating agency which is created. Ordinarily the operating company of the salvaging vessel includes with its claim as operator the salvage claims of the vessel's crew as well. The arrangement provided by Article 10 is therefore inconsistent with any idea that the general agent is to be operating agent and employer of the crew. It is the United States which, as employer of the crew, is to assert their claims.

Articles 11 and 12 provide for the rights of the parties to terminate the agreement and the action to be taken upon termination. They are substantially identical in the agreements for all types of agency.[38a] The basic provision is that upon termi-

nation "all property of whatsoever kind then in the custody of" the agent pursuant to the agreement "shall be immediately turned over to the United States, at times and places to be fixed by the United States."[38a] In the case of the general agency agreement, the words read "all vessels and other property of whatsoever kind." The added language relates to the situation covered more fully by the special *Article 20*, found only in the GAA 4–4–42 form. It was designed to cover the circumstance that the GAA 4–4–42 agreements which were first signed involved the retaking by the United States of government-owned vessels which, prior to February 25, 1942, had been bareboat chartered to the same companies as private operators under the form known as the "one-cent bareboat charter" (see *supra*, pp. 52–53). It was accordingly thought necessary to make special provision in Article 12 for the return of vessels in the event of termination retroactively or *in limine*.

Articles 13 and 15 are again substantially identical in all types of agreement. They provide that the United States shall have the benefit of any existing contracts or arrangements of the various types of agent in respect of any services, supplies, or facilities, and provide that the Government may control all such arrangements.

Articles 17, 18, and 19 are likewise substantially

[38a] Even the provision that termination shall not be effective until the arrival of the vessel in a United States port, upon which opposing counsel rely for evidence that the general agent is in possession of the ship, is common to the berth agency forms as well.

identical in all types of agreement. They provide for the manner in which the authority and control of the United States may be exercised under the agreements and contain the required warranties by a party contracting with the Government that no commissions have been paid or influence employed to obtain the contract.

This similarity between the various types of agency agreements, taken together with the division of shoreside duties between the general agent and the berth agent (*supra*, pp. 53–57)[38b] makes it abundantly plain that on neither of them did the United States confer the operating ownership or possession and control of its vessels. Their coordinate and correlative function show plainly that only the Government as principal of all three of its agents, shipmaster, ship's husband and berth agent, was the operating owner in possession and control of its ship.

6. *Examination of the Operations Regulations governing wartime direct government operation confirms that the agent did not operate the vessels.*—The foregoing analysis shows that general agents and berth agents, employed in connection with the operation of WSA vessels, were mere agents limited to the performance of shore-side non-navigating functions under detailed supervision, and that they lacked any of the authority or discretion exercised by operating agents or any other type of owner *pro hac vice* having the possession and control of vessels. All forms of agency agree-

[38b] See letter of the General Counsel, U. S. Martime Commission, Appendix B, *infra*, pp. 153–156, 162–169.

ments made the agent's every action subject to "such directions, orders, and regulations" as the United States should prescribe. And in fact, agents' activities were controlled in the most minute detail through extensive series of "general orders," "operations regulations," "traffic regulations," "fiscal regulations," "auditing and accounting instructions," "insurance instructions," "legal bulletins," and "medical directives" issued by the respective units of WSA pursuant to the provisions of Article 2 of GAA 4–4–42.

Supervision and compliance was maintained with the aid of some 5,000 employees located in the principal American and foreign ports, as well as by a small headquarters staff at Washington. Secrecy was promoted and even any influence of agents over the direct government operation of vessels was curtailed by the Government's practice of appointing separate general agents to husband its vessels and berth agents to attend to their port services. Discretion was kept to a minimum by the Government's execution of master contracts for the principal services and supplies which agents were supposed to obtain for vessels on the requisition of the Government's shipmasters.

Clear evidence of the controlling hand of the Government is furnished by the various Operations Regulations addressed to general agents. Despite continued ineffectual efforts of opposing counsel to establish the contrary, these speak plainly in the language of the operating owner, having authority, to the agent who is a mere channel of communication. They show that the agents were allowed no

authority and scarcely any influence over the masters and their operation of the vessels for the United States, but were rigorously confined to serving as a channel of communication between the Government and its shipmasters and the handling of the vessel's shoreside business operations. The circumstance that instructions and regulations issued by the WSA in some instances referred to the agents as "operators" is in nowise inconsistent. Read in context, it is obvious that the term was employed only in the sense that the general agent was a "shipping operator" and "operated" the vessel's "business", as provided by the GAA 4-4-42 agreement. This, however loose the usage, accords with the colloquial employment of the word "operated" in the shipping world. In the mouths of shipping men, "operated" and "operator" are used in respect to rendering any service to a vessel. Ordinarily, it is not intended to mean that the "operator" has possession and control of the vessel as operating owner for the voyage, so as to be engaged in its physical navigation and management through a shipmaster employed on its behalf.[39]

[39] Thus, for example, berth agents and sub-agents, who render only "port services," entirely separate and in addition to the "husbanding services" which are rendered by the general agent, are constantly said to "operate the vessel" in such port services. See, for example, the explanatory footnote to the standard form berth agency agreement "BA 12-29-43" as published in House Merchant Marine and Fisheries Committee, Doc. No. 4, *Compilation of Standard Contract Forms of the WSA* (usually called the "Gray Book"), p. 367: "Unless otherwise determined by the Administrator, when a

An examination of typical regulations is conclusive that the agents have not been granted authority over the masters.

Operations Regulation No. 4 provides: "*General Agents shall assign to each new vessel* * * * *a Master, Chief Mate, Chief Engineer and First Assistant Engineer,* approximately thirty (30) days prior to the completion and delivery date. All other officers and department heads, including Radio Operators and Chief Stewards, as authorized by War Shipping Administration, shall be assigned approximately ten (10) days prior to such date * * * The unlicensed personnel, except as otherwise provided for herein, shall be placed on the vessel effective as of the date of delivery to the General Agent."

Regulation No. 9, Supplement No. 1, provides: "*General Agents of War Shipping Administration are authorized and directed to employ* as a member of the crew of each EC–2 Liberty type vessel one Junior Third Mate * * * The terms of employment shall be in accordance with the General

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vessel assigned to an Agent or General Agent is required for operation in a service in which another operator is recognized by WSA as a regular berth operator or as being otherwise qualified to operate in such services, such operator is designated by WSA as the *Berth Agent of the United States to operate the vessel in such services.* The Berth Agency Service Agreement (BA) is the form of agreement entered into by the United States of America, acting by and through the Administrator, War Shipping Administration, and the berth or other operators approved by the Administration, appointing such operators as Berth Agents *to conduct the business of vessels* assigned to them from time to time by the United States." [Italics supplied.]

Agent's applicable collective bargaining agreement or as provided in Article 3A (d) of the Service Agreement."

Regulation No. 12, Supplement 1, provides: "It is clear from the provisions of Article 3A (d) of the General Agency Service Agreement that *Masters and crew members are employees of the United States,* but no specific provision is made in the GAA, TCA, or BA agreements as to whether other personnel are employees of the United States or of the Agents, General Agents, or Berth Agents. * * * *Excepting only additions to the vessel's crew* and employees of independent contractors, personnel employed by General Agents pursuant to Operations Regulation No. 12 are employees of the General Agent and not of the United States. Other personnel directly employed by Agents, General Agents, and Berth Agents (and their Sub-Agents) to perform work in connection with vessels or their cargo and special work incident thereto, including shore gangs, checkers, tallymen, watchmen, guards, coal trimmers, and other extra labor, but excluding relief officers, shore relief, and crew members, are employees of such Agents and not of the United States."

Regulation No. 15, Directive No. 2, provides: "The Master of a vessel has full discretion in signing on crew members and may reject any person seeking employment. * * *. Records shall be kept of the names of those rejected and of the reason for rejection and shall be submitted to the port office of the Recruitment and Manning Organiza-

tion of the War Shipping Administration in the port in which the rejection occurs."

Regulation No. 16, Directive No. 3, provides: "1. *When vessels are part of an active task force* or are operating in theatres of war, the *Masters are subject to the order of the Commanding Officers of the appropriate force* or theatre, and disobedience on the part of the Master and crew to such orders may subject the Master and crew to military discipline. 2. When vessels are not part of an active task force or are not operating in theatres of war, the *control and authority over the vessel rests solely with the Master, subject to the directions of the War Shipping Administration.*"

Regulation No. 30 provides: "*General Agents* * * * *are instructed to notify the masters* of such vessels to bolt down securely deep tank covers even when the deep tanks are used for carrying dry cargo."

Regulation No. 42 involves safety precautions aboard merchant vessels and provides: "*General Agents* * * * *are, therefore, directed to instruct the Master and Chief Engineer* aboard each vessel to ascertain, prior to proceeding to sea, the condition of the floor plates in the engine and fire rooms of their vessel * * * to take the necessary steps to have them firmly bolted."

Regulation No. 43 involves fuel oil conservation and provides: "*General Agents* * * * *are directed to instruct Masters* that wherever practicable, water shall be utilized for ballast purposes in lieu of fuel oil."

Regulation No. 46 requires General Agents to issue appropriate instructions to masters and others regarding WSA's regulations that *"responsibility for the stowage of cargo,* including the quantity to be loaded, the distribution of the cargo and the manner of stowage, *should rest with the Master."* Shore personnel of WSA and General Agents *"should go no further than to make suggestions,* subject always to the Master's approval or disapproval, and should be careful to avoid the direction or supervision of the stowage of cargo."

Regulation No. 48 (Revised) provides: *"General Agents are directed to instruct Masters* that stores, supplies and equipment are to be ordered through the vessels' *port agents."*

Regulation No. 50, involving crew advances in foreign ports, provides: *"General Agents are * * * directed to caution masters and crews* of vessels calling at ports in foreign countries to discontinue payments in Dollar currency and to refrain from transactions in United States money."

Regulation No. 51, Supplement 2, relates to pollution of navigable waters of the United States and provides: "All agents of the War Shipping Administration are hereby directed to give a copy of this Regulation to the Master of each vessel * * *. *Masters shall be instructed* to post this matter on the ships' bulletin boards or otherwise bring it to the attention of all ships' personnel."

Regulation No. 52 provides: "*General Agents are therefore directed to instruct Masters of all vessels* * * * to keep shaft alley doors closed at all times except when it becomes necessary to fill bearing reservoirs or make repairs. General Agents are further directed to *instruct Masters* that a notice to this effect must be posted adjacent to the shaft alley door * * *."

Regulation No. 54, relating to pilferage of cargo, provides: "*General Agents are directed to notify Masters* that even under wartime conditions, it still is the responsibility of the Master and his officers to see that cargo is delivered at destination free of damage and pilferage."

Regulation No. 56 requires *the General Agent to instruct masters* to familiarize themselves with protective measures relating to anti-gas preparations for merchant vessels.

Regulation No. 58 concerns the status of military and naval personnel assigned aboard merchant vessels and directs the general agents to *instruct* the masters in connection with and to comply therewith.

Regulation No. 62 provides: "* * * *each General Agent is instructed to advise both the Masters and Chief Engineers* of all vessels under their jurisdiction that fuel oil, reserve feed and fresh water piping system suctions are to be opened only on one oil and one water line when actually in use * * *."

Regulation No. 63, concerning the employment of staff officers, provides: "*General Agents* * * *

*are directed to employ * * * a Junior Assistant Purser* at a basic monthly salary of $120.00."

Regulation No. 81 provides: "General Agents of the War Shipping Administration *are directed to instruct Masters* to inform Armed Guard Officers as to the time and place of convoy conferences in sufficinet time to accompany the Masters to the conferences."

Regulation No. 83 provides: "*General Agents * * * are hereby directed to instruct ships' personnel* of the following practice to be observed in establishing quantities of Bunker Fuel Oil acquired or discharged * * *"

Regulation No. 87 directs general agents that "*All Masters and Pursers shall be instructed* to submit to the General Agent an accurate and detailed statement of expenses properly incurred for account of the vessel."

Regulation No. 99, Supplement 2, provides: "General Agents are expected to provide the War Shipping Administration complete information regarding any irregularities concerning ships' stores, supplies and equipment, including slop chest property. * * * *General agents are directed to instruct* all masters to prepare form SA-1, Master's Report of Loss, copy attached, on every occasion * * * *General Agents should advise masters* regarding their requirements of copies of the reports in addition to the copies required by the WSA."

All these regulations cover the minutiae of management and operation of the vessels and show that

the agent is denied any authority or control over the civil service masters and crews of the Government's vessels, but is solely confined to serving as a channel of command between the Division of Ship Operations of WSA and the Government's shipmasters, and to attending to the management of the vessels' shoreside business operations. They constitute the administrative practice evidencing the interpretation given the agency agreements by the parties themselves, and demonstrate that the authority of the agent stops at the water's edge. As the agent has no authority over the master, officers, and crew, so he should have no liability for their acts.

7. *The treatment by Congress of War Shipping Administration seamen establishes that the United States and not its agents was operating the vessels.*—Congress, with the passage of the Clarification Act (57 Stat. 45), expressly recognized the status of seamen serving on vessels owned by or bareboat chartered to the United States, through the War Shipping Administration, as government employees. By that Act, Congress provided for the exercise by such seamen of rights and benefits under the Jones and Social Security Acts which were available to seamen employed by private ship operators. Such rights had not been theretofore regarded as available to seamen who were government employees employed by WSA. Their right to United States Employees' Compensation Act

benefits had been regarded as exclusive. See Point V, *infra*.[40]

Prior to the date of the passage of that Act, such seamen, as employees of the United States, were not engaged in employment covered by the Federal Insurance Contributions Act and were not entitled to benefits under the old age benefit provisions of the Social Security Act. The Clarification Act provided for payment of contributions on behalf of such seamen and amended Section 1426 of the Internal Revenue Code (26 U. S. C., 1426 (i) and Section 209 of the Social Security Act (42 U. S. C., 409 (ó)) so as specifically to include under the definition of "employment" in those statutes the services performed by seamen employed on vessels owned by or bareboat chartered to the United States and operated by WSA.

Without this action by Congress it was not possible for such seamen, because of their government employee status, to enjoy the benefits which would have been theirs automatically had they been employees of the general agent. The committee reports leave no doubt that the status of such crew members as employees of the United States was fully understood and recognized by Congress. See S. Rept. 62, 78th Cong., 1st sess., pp. 5–6; H. Rept. 107, 78th Cong., 1st sess., pp. 2, 15; and further discussion in Point V, *infra*.

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[40] See *O'Neal* v. *United States*, 11 F. 2d 869 (E. D. N. Y.), affirmed, 11 F. 2d 871 (C. A. 2); *Posey* v. *T. V. A.*, 93 F. 2d 726 (C. A. 5).

Again, in connection with the Federal Employees' Pay Act of June 30, 1945, c. 212, 59 Stat. 295, 305, Congress recognized the status of WSA seamen as employees of the United States. Since they were all unclassified civil-service employees, it was unnecessary to make provision in the act for their pay. They were, however, expressly exempted from the ceiling on the number of federal employees. Accordingly, Section 607 (f) provided that, "Until the cessation of hostilities in the present war as proclaimed by the President, the provisions of this section shall not be applicable to * * * individuals * * * to whom the provisions of section 1 (a) of the [War Shipping Administration (Clarification)] Act of March 24, 1943 (Public Law Numbered 17, Seventy-eighth Congress), are applicable."

Further Congressional recognition of the status of such crew members as employees of the United States is found in the provisions of the Social Security Act Amendments of August 10, 1946, c. 951, 60 Stat. 978–981 (26 U. S. C. 1606 (f)), which amended the Federal Employment Tax Act expressly to authorize the states to bring services performed by seamen on interstate voyages under the coverage of their unemployment insurance laws. Several states, including the leading maritime states of California and New York, had already taken steps to cover such seamen, at least to the extent of vessels operated from a single state. But to permit all maritime states to join in an interstate agreement for

exchange of wage information among the unemployment insurance authorities of participating states which was to serve as a basis for the payment of benefits to seamen employed on vessels operating out of more than one state, it was necessary to amend the federal act so as to authorize the states to cover seamen in the same manner as local employees. In thus amending the act, Congress expressly excluded from its coverage the crews of vessels operated by WSA. Congress instead made specific provision for payment of benefits to unemployed seamen formerly employed by WSA on vessels owned by or bareboat chartered to WSA or the Maritime Commission.

This was accomplished by the addition to the Social Security Act of Title XIII (42 U. S. C. 1331–1336), authorizing the Federal Security Administrator to enter into agreements with the several maritime states for the payment of benefits to former WSA seamen during a so-called reconversion period lasting until June 30, 1949. Under such agreements, the states pay compensation to such seamen as if they were covered under the state law, and in return obtain reimbursement from the Federal Security Administrator. Absent such arrangements, the Federal Security Administrator is directed to make the payments directly to the former government seamen. The legislative history evidences express recognition that WSA seamen were employees of the Government, and not of its agents so as to be taxable by the states. The Committee reports of both

houses are unanimous in this regard. Thus, H. Rept. No. 2526, 79th Cong., 2d sess., p. 7, states:

> The committee recognizes that because of the fact that the great bulk of maritime work has been carried on by employees of the Federal Government since the beginning of the war the mere coverage of private maritime employment under the laws of the several States will not afford full protection for most maritime workers for whatever unemployment may occur in the next 2 or 3 years. The bill therefore authorizes the Federal Security Administrator to make arrangements with the States under the terms of which the States would extend credit for Federal maritime wages in calculating benefits under their own State laws. The bill further provides that the Federal Government will reimburse the States for such costs as are incurred in the process of crediting Federal maritime wages and paying benefits thereon, which would not otherwise have been incurred.

See also H. Rept. No. 2447, 79th Cong., 2d sess., pp. 7–9; S. Rept. No. 1862, 79th Cong., 2d sess., pp. 5–6.

But most significant of all are the statements in connection with the Government-seamen's Relief Bill (H. R. 4873, 80th Cong., 2d sess.) which was introduced, at the request of representatives of seamen and other third parties, for the purpose of reviving the rights of seamen and other third persons to sue the United States in cases where these rights have become time-barred while suits have

n improperly brought against the Government's
neral agents or shipmasters for negligence of the
ws of government vessels. This bill passed the
use on June 8, 1948 (94 Cong. Rec. 7389), was
ferred to the Senate Judiciary Committee on
ne 9, 1948 (94 Cong. Rec. 7503), but could not be
ed on before the adjournment of Congress.[40a] In
vorably reporting the bill, the House Judiciary
mmittee said (H. Rept. 2060, 80th Cong., 2d
s., p. 2):

> The Supreme Court then, in 1942, in *Brady* v. *Roosevelt Steamship Company* (317 U. S. 575), held that the Suits in Admiralty Act, by furnishing an in personam remedy against the United States, did not free the agent from liability for the torts of its own employees. This case was followed in 1946 by the Court's decision in *Hust* v. *Moore-McCormack* (328 U. S. 707). These cases together were popularly taken as an endorsement by the highest court in the land of the theory of duality of remedy in all cases. Accordingly, many litigants, relying upon these decisions, brought their suits against the agent only because of the opportunity for a jury trial which many of them preferred. Then the Supreme Court on June 23, 1947, handed down its decision in *Caldarola* v. *Eckert* (332 U. S. 155), which clarified, in the opinion of the committee, the rule previously announced so as to make it plain that the agent while liable for the negligence of its own employees was not liable for the negligence of the civil-service

[40a] The bill has been reintroduced as H. R. 483, 81st Cong., sess.

masters and crews with whom the United States manned the vessels. For the negligence of those, the United States was the only responsible party. The committee believes that litigants should not be made the victims of the legal confusion regarding the proper remedy in such cases, and are not responsible for the conditions brought about by the lack of clarity in the opinions of the Supreme Court.

8. *Conclusion.* The materials which have been set forth above serve only as a partial illustration of the complex nature of the vital operation in which the War Shipping Administration engaged, and the practical solutions which were given to the problems which that Administration faced, as it "* * * actively engaged in operating * * * the largest merchant marine in the world's history. * * *" H. Rept. No. 107, 78th Cong., 1st sess. at p. 12. At all times during this operation, the legal relationship of employer and employee between the United States and its civil-service crew members was specifically maintained. We submit that at no time was any action ever taken that would justify the conclusion that the general agents were operating agents or that the seamen were employees of the Government's shoreside agents.

IV

THE UNITED STATES AS OPERATING OWNER IN EXCLUSIVE POSSESSION AND CONTROL OF ITS VESSELS, AND NOT ITS GENERAL AGENTS, WAS SOLELY RESPONSIBLE FOR THE ACTS OF THE MASTER AND CREW

We have seen that the United States was in exclusive possession and control of its vessels through its ship masters who were its direct and independent agents for the navigation and physical management and operation of its vessels. Shoreside agents of the Government, whether general agents, berth agents, or berth subagents, were restricted to operating various parts of the vessels' business and carefully excluded from any authority or control over their navigation and physical management and operation. Agents served as an ordinary channel of communication between WSA and its ship masters, and assisted the latter with the payrolls and procurement of supplies and men, but nothing more (Point III, *supra*). In such circumstances, the ship's husband or shoreside agent of a private ship operator would plainly not be held liable. We believe that a consideration of the applicable decisions with respect to private ship operations, and a review of the absence of any reason for applying a less favorable rule to government agents, demonstrates that general agents of the United States should likewise not be held liable for the acts of the master and crew, whether to seamen or other third parties.

1. *Only one who is owner or owner pro hac vice operating the vessel is liable for the acts of the master and crew in its navigation and management.*— In private shipping operations it is definitely established that an agent, unless the vessel is demised to him as operating agent, so as to make him owner *pro hac vice* or temporary operating owner in place of the vessel's general owner, cannot be held liable for the acts of the master, officers and crew. The principle is so deep-rooted that it appears only once to have been questioned, even obliquely, before the courts. In *Cox* v. *Lykes Bros.*, 237 N. Y. 376, suit was brought against the Shipping Board Fleet Corporation of World War I and Lykes Bros., its agent for various limited purposes. Lykes Bros., not being operating agent, had been dismissed by the trial court (204 App. Div. 442, 443). The question on appeal was whether the Fleet Corporation, which admittedly was an operating agent to whom the vessel were demised, was liable. Judge Cardozo observed of the status of the Fleet Corporation (at p. 383):

> * * * In operating the *Bethlehem Bridge*, it acted for itself alone, with possession and control complete and unrestricted. The contracts of employment were its contracts; the stores its stores; the payments for wages, as well as for all other expenses, its payments; the profits its own, and its own the losses. If the action were for wages proper, its liability would not be questioned. Lykes Brothers were merely agents, and the

> undisclosed principal [The Fleet Corporation] was chargeable upon contracts made for its account in the business of the agency.

No other case is known involving even an attempt to impose liability on the agent of a vessel which was not demised to the agent, but for which he was a mere ship's husband or shoreside agent without possession, command, and control. A counterpart to the distinction between operating agents to whom the ship is demised and husbanding agents operating only the vessel's shoreside business, is found in the similar distinction between bareboat charterers to whom the ship is demised and time or voyage charterers, who only hire the reach and burden of the vessel. In the charter situation numerous cases establish that the critical test is whose agent or employee the vessel's master is. Nothing less than exclusive authority and control over the master can make the charterer the principal of the master and the owner *pro hac vice* or temporary operating owner of the vessel. *Reed* v. *United States,* 11 Wall. 591, 600; *United States* v. *Shea,* 152 U. S. 178.

It is well settled that, if there is any doubt that the general owner has divested himself of possession and control and has constituted another operating owner in possession and control, "then the general owners must be deemed such for their rights and authority continue until displaced by some clear and determinate transfer of them; * * *. The legal presumption is in favor of the continuance

of ownership and against any transfer * * *."
See *Hagar* v. *Clark*, 78 N. Y. 45, 50; *Raymond* v. *Tyson*, 17 How. 53, 63–64; *Pacific Imp. Co.* v. *Schubach-Hamilton S. S. Co.*, 214 Fed. 854 (W. D. Wash.); *Grimberg* v. *Columbia Packers' Ass'n*, 47 Ore. 257, 270–271.

The role of the ship's husband in procuring the crew for employment by the master on behalf of the operating owner is immaterial so far as liability is concerned. It is elementary that only the principal, and not the agent procuring the engagement, is responsible for the torts of such other agents and employees. In the words of Justice Story (*Agency* (9th ed., 1882), Sec. 313, p. 385):

> But no action will ordinarily lie against an agent for the misfeasance, or for the negligence of those whom he has retained for the service of his principal, by his consent or authority, any more than it will lie against a servant who hires laborers for his master at his request, for their acts; unless, indeed, in either case, the particular acts which occasion the damage are done by the orders or directions of such agent or servant. The action, under other circumstances, must be brought either against the principal or against the immediate actors in the wrong.[41]

[41] To the same effect see 1 Labatt, *Master and Servant* (2d ed., 1913) pp. 102–103: "It is well settled that, where an employee, acting under the express or implied authority of his principal, engages servants to perform work for the benefit of his employer, the principal, and not the employee, is in law the master of the servants so engaged. This doctrine is

"In the case of actionable negligence the rule is well settled * * * that the negligence of a subordinate employee or subagent is not to be imputed to a superior employee or agent, but only to the master or principal." *Handley* v. *Lombardi*, 122 Cal. App. 22, 29; *Dowler* v. *Johnson*, 225 N. Y. 39.

It is absolutely essential to the status of an operating agent or owner *pro hac vice* that he be placed in exclusive possession, command, and control of the ship; and loose expressions, in maritime agreements, concerning the delivery and redelivery of the vessel are not controlling. Such words have been repeatedly held not to evidence a demise or transfer of possession and control which imposes liability for negligence of the master and crew. *Clyde Commercial S. S. Co.* v. *West India S. S. Co.*, 169 Fed. 275, 277 (C. A. 2); *Grimberg* v. *Columbia Packers' Ass'n*, 47 Ore. 257, 270–271; *The Volund*, 181 Fed. 643, 665–667 (C. A. 2); *Adams* v. *Homeyer*, 45 Mo. 545, 551–552. In their context, the terms are more readily understood as referring to the commencement and termination of the contract than to a transfer of the possession, control, and management of the vessel. *Grimberg* v. *Columbia Packers*, *supra*. See fn. 24, *supra*, p. 57. So long

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an obvious and necessary consequence of the fact that, in the case supposed, the power of controlling the servants, even though it may normally be exercised by the agent after they are hired, really resides in the principal, and may at any time be called into active exercise." See, also, *Restatement of Agency*, sec. 79, comment (a).

as the general owner preserves his ultimate authority over the master, he continues as operating owner and the other party does not become owner *pro hac vice* liable for faults in the navigation and management of the vessel, even though the master is subject to his orders respecting the business operations of the voyage. *Worrall* v. *Davis Coal & Coke Co.*, 122 Fed. 436, 438 (C. A. 2) (negligent damage to vessel); *The Volund*, 181 Fed. 643, 665–667 (C. A. 2) (negligent navigation); *Grimberg* v. *Columbia Packers' Ass'n*, 47 Ore. 257, 270–271 (negligent personal injury). Absent the exclusive authority over the master as well as possession and control of the vessel which result from a demise, the agent is in the same situation as the charterer to whom only the use of the ship is delivered and not the ship itself, and vicarious liability for the negligence of the master and crew remains exclusively that of the general owner. *The Volund, supra; Grimberg* v. *Columbia Packers' Assn., supra;* cf. *Thorp* v. *Hammond*, 12 Wall. 408, 416.

The right of seamen to recover wages, and maintenance and cure, follows the same rule. It is well settled that whoever is the operating owner for the voyage is liable for wages, maintenance, improper discharge, and all other obligations due the seamen. But the seaman's statutory contract is with the master and if he is to recover from another, he must establish that the party sought to be held liable was in fact the operating owner of the vessel for the voyage and not a time or voyage charterer or

agent for a limited purpose, nor yet a general owner who has parted with the operation and control of his vessel to another who operates it as owner *pro hac vice*. *Everett* v. *United States*, 284 Fed. 203 (C. A. 9), certiorari denied, 261 U. S. 615; *The Del Norte*, 119 Fed. 118, 123 (C. A. 9); *The John E. Berwind*, 56 F. 2d 13 (C. A. 2); *Bacarat* v. *Andrew F. Mahoney Co.*, 1933 A. M. C. 1652, 1656 (N. D. Calif.); *Roberts* v. *United States S. B. Emergency Fleet Corp.*, 240 N. Y. 474, 477; *Cox* v. *Lykes Bros.*, 237 N. Y. 376. To hold liable a ship's husband who has merely "procured" the master and crew for a disclosed principal would be contrary to the express provisions of the statutes and the law maritime, and unrealistic in fact. As the court observed in *Hughes* v. *Southern Pacific Co.*, 274 Fed. 876 (S. D. N. Y.):

> Shipping articles constitute a contract executed by and between the master of a vessel, as agent for the owners, and each member of the crew shipped before a United States shipping commission. The master virtute officii employs and discharges the seamen * * *.

Absent the necessary language and intent to create a demise of the vessel and to constitute an agent or charterer as operating agent or owner for the voyage, it is plain that if the principal is disclosed his agent is not liable for contracts made on this principal's behalf. *Whitney* v. *Wyman*, 101 U. S. 392, 396; *Parks* v. *Ross*, 11 How. 362, 374; *Hodgson* v. *Dexter*, 1 Cranch 345, 363–364; *Feldman*

v. *American Palestine Line*, 18 F. 2d 749, 750 (C. A. 2).

We therefore submit that, unless a different rule is to be applied to government than to private agents, there is no basis for holding liable mere ships' husbands, such as petitioner and the Government's other general agents.

2. *Neither before nor after the Clarification Act has there been any basis for applying a different rule to government agents who are not operating the vessel.*—Application to general agents under GAA 4–4–42 of these settled rules, governing the liability of agents of disclosed private principals, similarly bars liability here. And far from discriminating against the Government's general agents because government service is involved, we believe that factor provides a special reason for invoking the rule in these cases.

a. For a hundred years it has been settled that the rule that only the principal and not the superior agent or employee is liable for the acts of the subordinate (*supra*, pp. 105–6) has been applied with even greater rigor to public officers and agents. Even where the government agent exercises direct supervision and control over subordinate government employees charged with fault, the government agent sued does not thereby become a tort-feasor and cannot be held liable for their wrongs. "A public officer or agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the

subagents or servants or other persons properly employed by or under him, in the discharge of his official duties." *Robertson* v. *Sichel*, 127 U. S. 507, 515–517; *Malewicki* v. *Qvale*, 298 Fed. 301 (C. A. 8); *Zinkhan* v. *District of Columbia*, 271 Fed. 542, 545 (C. A. D. C.); *Jones* v. *Kennedy*, 121 F. 2d 40, 44 (C. A. D. C.), certiorari denied, 314 U. S. 665; *Riggin* v. *Brown*, 59 Fed. 1005 (D. Md.); *Lajoie* v. *Milliken*, 242 Mass. 508.

Nothing in the case of *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, indicates a disposition to overrule this established principle. *Emergency Fleet Corp.* v. *Lustgarten*, 280 U. S. 320, was specifically overruled (317 U. S. at 578) so far as the latter had held government agents immune from independent liability for the torts of their own employees merely because government money would be used to indemnify the agent. But although the Roosevelt agreement was an operating agency under which the Government demised its vessels to the agent as owner *pro hac vice* to man and operate with its own masters and crews (*supra*, pp. 50–1, 58–9, *infra*, p. 125), this Court carefully specified that it held only "that the Suits in Admiralty Act did not deprive petitioner of the right to sue respondent for damages for his maritime tort." Its decision reached no further: "Whether a cause of action against respondent has been established is, of course, a different question" (317 U. S. at 585).

Hust v. *Moore-McCormack Lines*, 328 U. S. 707, and cases purporting to follow it aside, the rule that

only the principal and not the superior agent is liable has been applied consistently to general agents husbanding vessels for the United States. *Caldarola* v. *Eckert*, 332 U. S. 155, 159; *Publicker Commercial Alcohol Co.* v. *American-Hawaiian S. S. Co.*, 165 F. 2d 1002, 1006 (C. A. 3); *McGowan* v. *J. H. Winchester & Co.*, 168 F. 2d 924 (C. A. 2), certiorari denied, 335 U. S. 861 (November 8, 1948, Nos. 311, 312, this Term); *Williams* v. *American Foreign S. S. Corp.*, 65 F. Supp. 900 (S. D. N. Y.); *Murray* v. *American Export Lines*, 53 F. Supp. 861 (S. D. N. Y.) [42]

[42] Before *Hust*, almost every case cited as authority for the liability of agents under GAA 4-4-42 was a case where the obligations of the defendant went far beyond those of a mere general agent. In *Carroll* v. *United States*, 133 F. 2d 690 (C. A. 2), and *McCormick* v. *Moore-McCormack Lines*, 54 F. Supp. 399 (E. D. Pa.), defendants were owners *pro hac vice* under a bareboat charter when the seamen signed articles and the voyage began. *Supra*, pp. 52–3, *infra*, p. 117. In *Moser* v. *Standard Oil Co. of New Jersey*, 60 F. Supp. 6 (E. D. Pa.), and *Schuller* v. *Matson Nav. Co.*, 43 N. Y. S. 2d 566, defendants were general owners in possession, operating their own vessels for the United States. In *Moss* v. *Alaska Packers' Assn.*, 79 Cal. App. 2d 857, and *Lewis* v. *U. S. Navigation Co.*, 57 F. Supp. 652 (S. D. N. Y.), the shipping articles did not mention the Government, and on the facts the defendants were held liable as agents for undisclosed principals. *Gay* v. *Pope & Talbot*, 183 Misc. 162, merely held that whenever an agent was independently liable to third persons for the negligence of its own employees in connection with the operation of a government vessel, such third persons, if seamen on the vessel, might enforce such independent liability by suit under the Jones Act with the benefit of jury trial and the absence of contributory negligence and assumption of risk defenses. This, as pointed out, *supra*, p. 36, accords with the Government's position in these situations.

b. The principle embodied in the loaned servant rule confirms that the right of government seamen to bring Jones Act suits against government agents does not of itself justify imposing vicarious liability on these agents. Even if the general agent may be deemed in a special sense the "employer" of the crew so as to permit them to bring suit under the Jones Act (see *Caldarola v. Eckert*, 332 U. S. 155, 159),[43] still he is not the operating agent or owner *pro hac vice* of the vessel and employer *pro hac vice* of the master and crew for purposes of vicarious liability, since the work of the master and crew in the navigation, management, and operation of the vessel is not his work nor subject to his control. Vicarious liability is imposed by the law because the servant is doing his employer's work and the latter is bound to see that his work is so conducted that others are not injured; but this responsibility cannot extend beyond the limits of the employer's work, and if the employee is doing his own work, or that of another, the employer is not answerable for his negligence in the performance of it. So here, the work which the master and crew are doing is work of the United States which it has not delegated to the general agent, and the latter has no authority or control over the work and therefore no responsibility for the negligence of the master and crew in its execution.

[43] As pointed out, *supra*, p. 36, fn. 13, the Jones Act, unlike the Federal Employers' Liability Act, refers only to injuries in the course of employment and does not appear to require an employer-employee relationship.

Only the United States, as the principal whose work the master and crew are doing, can be held liable for their negligence or misconduct. *Denton* v. *Yazoo & M. V. R. R. Co.*, 284 U. S. 305, 308–309; *Norfolk & W. Ry. Co.* v. *Hall*, 57 F. 2d 1004, 1008 (C. A. 4); *McLamb* v. *E. I. DuPont De Nemours & Co.*, 79 F. 2d 966 (C. A. 4); *Hardy* v. *Shedden Co.*, 78 Fed. 610, 613 (C. A. 66); *Byrne* v. *Kansas City, Ft. S. & M. R. R. Co.*, 61 Fed. 605 (C. A. 6).

c. With respect to claims for maintenance, cure, and wages under the federal maritime law, the same situation prevails as in the case of liability for the negligence of the master and crew. The seaman's right to maintenance, cure, and wages arises out of his contract of employment—the shipping articles, which are between the seamen and the master as representative of the operating owner to whom the vessel belongs for the voyage. 46 U. S. C. 713, 564; see *supra*, pp. 55, 63–6, 107–9. Accordingly, under established principles, a government seaman's claim in this respect, as in respect of his rights under the Jones Act for negligence of the Government's master and crew, may not be asserted against the general agent, but only against the United States, the disclosed principal named in the shipping articles as the operating owner to whom the vessel belongs for the voyage. *Shilman* v. *United States*, 164 F. 2d 649, 652 (C. A. 2), cer-

tiorari denied, 333 U. S. 837; *Conlon* v. *Hammond Shipping Co.*, 55 F. Supp. 635 (N. D. Calif.)."

For these reasons, we urge that the present case requires the application of the traditional rules of liability as applied in the *Caldarola* case, and this Court should hold that in accordance with that case the liability of a government general agent does not exceed that of the similar agent for a private principal.

V

THE CLARIFICATION ACT REQUIRES THAT AFTER ITS ENACTMENT GOVERNMENT-EMPLOYED SEAMEN SHALL VINDICATE THEIR RIGHTS EXCLUSIVELY BY SUIT AGAINST THE UNITED STATES UNDER THE SUITS IN ADMIRALTY ACT

Thus far, we have discussed the absence of any right by third persons, including seamen, to recover against government agents for the acts of the master and crew of WSA vessels (Points II, III, IV, *supra*). Even assuming, however, that other third persons are entitled to recover against government agents (which we deny), government seamen may not do so after the enactment of the War Shipping Administration (Clarification) Act of March 24, 1943 (c. 26, 57 Stat. 45). The purpose of Congress, in the Clarification Act, to make suit against the United States the exclusive remedy of government seamen is obvious from the literal language of Section 1 of the Act, which

[11] See also *Gaynor* v. *Agwilines*, 169 F. 2d 612, 617 (C. A. 3) now pending on writ of certiorari, No. 430; *Aird* v. *Weyerhaeuser S. S. Co.*, 169 F. 2d 606, 609 (C. A. 3) now pending on petition for a writ of certiorari No. 291 Misc.

gave government seamen "all of the rights [of] seamen on privately * * * operated * * * vessels", but directed that such rights shall "be enforced pursuant to the provisions of the Suits in Admiralty Act." Considered against the background of the rights of government-employed seamen prior to its introduction and the legislative history of its enactment, there does no seem to us to be much doubt but that the language of the Act must be literally interpreted and applied to bar government-employed seamen from any remedy other than by suit against the United States.

1. *The background of the Clarification Act indicates that suit was to be brought only under the Suits in Admiralty Act.*—The background of the Clarification Act lies in the rights and remedies of seamen, both government and privately employed, in February and March 1942, when WSA was created and proceeded to requisition the American merchant fleet and to inaugurate its plan for direct government operation of the larger part of that fleet with the assistance of existing shipping organizations as shoreside agents of various types. It must be recalled that prior to that time the entire merchant fleet was privately operated and ninety per cent of its 1,375 ocean-going vessels were privately owned. Ten per cent were government-owned but were demised by the Maritime Commission for private operation under the one-cent bareboat charters. *Supra*, pp. 48–52.

The seamen employed to operate both privately owned and government-owned vessels had rights against their private employers under the Jones Act and the general maritime law. In addition, those serving the operators of government-owned but privately operated vessels had rights under the general maritime law which were enforceable against the United States pursuant to the Suits in Admiralty Act.[45] Such seamen also had full rights under the Social Security legislation.

In February and March 1942, the only government-operated vessels manned by civilian merchant seamen were those of the Army Transport Service. Such vessels were public vessels of the United States employed exclusively as such and it was generally believed that the civilian government employees who manned them had no rights other than those under the United States Employees' Compensation Act. Not only were those rights thought to be exclusive (cf. *O'Neal* v. *United States*, 11 F. 2d 869 (E. D. N. Y.), affirmed, 11 F. 2d 871 (C. A. 2); *Posey* v. *T. V. A.*, 93 F. 2d 726 (C. A. 5)), but until much later it was believed that suits for personal injury and for wages, maintenance and cure could not be brought under the Public Vessels Act. Cf. *American Stevedores* v. *Porello*, 330 U. S. 446,

[45] They had no rights enforceable against the United States under the Jones Act because the United States was merely the reversionary owner out of possession, and the Jones Act, unlike the general martime law, does not give a right *in rem* enforceable against an owner who is not himself operating his vessel.

453, 458; *United States* v. *Loyola*, 161 F. 2d 126 (C. A. 9), and *Jentry* v. *United States*, 73 F. Supp. 899, 902 (S. D. Calif.).

When the War Shipping Administration embarked on its plan of direct government operation of its vessels with government-employed seamen, it was thought desirable, in view of the temporary character of their government employment, to preserve their rights under Social Security legislation and to remove them from what was believed to be the exclusive coverage of the United States Employees' Compensation and Civil Service Retirement Acts. But some of these temporary government seamen might have relied on these latter rights. Moreover, many of the government vessels had been converted from private operation under the one-cent bareboat charters to government operation under the general agency plan, in the course of voyages which had been commenced prior to the conversion. *Supra*, pp. 52–3, fn. 20. The rights of such seamen were, naturally, obscure. When they signed articles for the voyage they were private employees of private operators. Some of the seamen might have relied on the continuation of that status. That situation posed the question of whether their private status was instantaneously defeated by the change in the contract between the United States and the shipping company which had employed them. While it was later held that this was not so (see *Carroll* v. *United States*, 133 F. 2d 690 (C. A. 2); *McCormick* v. *Moore-McCormack Lines*, 54 F. Supp. 399 (E. D. Pa.)) there were, not unnaturally, doubts on both grounds.

The solution was apparent. The War Shipping Administration asked Congress for legislation which for the future would clearly exclude such temporary government employees from coverage by the United States Employees' Compensation and Civil Service Retirement Acts, and would grant them the rights of privately employed seamen to proceed under the Jones Act and the general maritime law. As befitted government employees, however, the rights thus granted were to be enforced only by suit against the United States. To preserve the rights of seamen during the change-over period to proceed against the private operators by whom they had been employed, if they desired, or to claim the benefit of the United States Employees' Compensation Act, or to avail themselves of the rights granted by the new legislation, it was provided that during the period beginning October 1, 1941, and continuing until the enactment of the new law on March 24, 1943, the seamen should have the right to enforce whatever rights they might have previously had or to elect the benefits of the new legislation.

In our view, this background of the Clarification Act makes it plain that the intention for the future was to couple the grant to government seamen of the rights of privately employed seamen with the requirement that those rights be enforced exclusively by suit against the United States.

2. *The legislative history of the Clarification Act shows suits were to be brought only under the Suits*

in Admiralty Act.—The legislative history of the Clarification Act, viewed against this background, admits of but one conclusion. It is the mandatory directive of the Act that suit to enforce the rights of government-employed seamen shall be brought only under the Suits in Admiralty Act. The hearings and debates, although extending over two sessions of Congress, are brief.[46] The aspects of the legislation which received particular attention confirm that Congress regarded it as essential that government-employed seamen be prohibited from proceeding against anyone except the United States as their employer. As stated by the court below in the companion case of *Fink* v. *Shepard S. S. Co.*, No. 360, the legislative history "demonstrates conclusively" that Congress required exclusive resort to suit against the United States because it intended to withhold the right of jury trial "from Govern-

[46] The steps in enactment follow: Introduced on July 22, 1942 (H. R. 7424, 77th Cong., 2d Sess.); hearings were had September 2, 1942, before the House Committee on Merchant Marine and Fisheries, which reported the bill on October 15, 1942 (H. Rept. No. 2572, 77th Cong., 2d Sess.). It passed the House on October 19, 1942, and in the Senate was reported on October 22, 1942, by the Committee on Commerce (S. Rept. No. 1655, 77th Cong., 2d Sess.). Recommitted, it was again reported on December 4, 1942 (S. Rept. No. 1813, 77th Cong., 2d Sess.). Following adjournment, the bill was reintroduced on January 6, 1943 (H. R. 133, 78th Cong., 1st Sess.) and was reported on February 8, 1943 (H. Rept. No. 107, 78th Cong., 1st Sess.). It passed the House on February 15, 1943, and in the Senate was reported on February 22, 1943, from the Committee on Commerce (S. Rept. No. 62, 78th Cong., 1st Sess.) and passed on March 2, 1943. A conference report of March 12, 1943 (H. Rept. 248, 78th Cong., 1st Sess.) was accepted by both houses.

ment-employed seamen for the duration of the war" (192 P. 2d at 268).

The Clarification Act was first introduced on July 22, 1942, as H. R. 7424, 77th Cong., 2d sess., and hearings were held on September 2, 1942. Immediately, the fact that jury trial would not be permitted by the bill, a matter which would have been of no consequence had it not been recognized that its purpose was to make suit under the Suits in Admiralty Act the exclusive remedy, became the object of strenuous objections. The most serious objections were those of the legislative representatives of the National Maritime Union, one of the unions which previously in May and June 1942 had entered into the over-all collective bargaining arrangement with WSA. A statement submitted by William L. Standard, then General Counsel of the National Maritime Union, made the following argument (House Merchant Marine and Fisheries Committee, *Hearings on H. R. 7424, 77th Cong., 2d Sess.*, p. 31):

> * * * If, therefore, H. R. 7424, in excluding merchant seamen from the benefits of the United States Employees' Compensation Act, afforded to merchant seamen employed on Government vessels, exactly the same rights now enjoyed by them as employees of privately owned vessels, the unions would naturally have no opposition to the adoption of such a bill.
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> Unfortunately, section 1 of H. R. 7424, at line 6, page 2, provides the following:

"Any claim referred to in clause (1) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the suits in admiralty act, notwithstanding the vessel on which the seaman is employed, is not a merchant vessel within the meaning of such act."

In requiring merchant seamen to present their claims under the suits in admiralty act, a definite limitation is imposed upon the exercise of their rights.

Under the suits in admiralty act, while it is true that merchant seamen enjoy the benefits of the Jones Act, and their rights are adjudicated pursuant to that act, the trial takes place before a Federal judge without the benefit of a jury trial.

* * * * *

The N. M. U., therefore, recommends that, in order that merchant seamen employed by the War Shipping Administration should not be deprived of a trial by jury, after the word "Act," at line 11, page 2, of the bill, the following be inserted:

"*Provided, however,* That the claimant may, at his election, maintain an action for damages at law, with the right of a trial by jury; and in such action the claimant may enjoy the same rights, benefits, exemptions, privileges, and liabilities of seamen employed on privately owned and operated vessels."

Attorney General Biddle submitted a reply, on behalf of the Department of Justice, explaining why jury trial was not compatible with the interest

the United States. He stated in part (*ibid.*, 3):

> I have no wish to oppose jury trial in these cases if to the Congress the adoption of such a policy seems wise. There are certain considerations which I think should be taken into account in reaching your conclusion on the issue of policy involved.
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> (2) It has been found necessary in protecting the security of the Nation to adopt an amendment to admiralty rule 46. It has been found that in the course of admiralty litigation information is made available to the enemy detrimental to the national safety and detrimental to the lives and welfare of seamen. The amendment to admiralty rule 46 contemplates careful surveillance of admiralty litigation and control of the proceedings to prevent leakage of information that might be of value to the enemy and of danger to the United States. The scheme of this protection is that every libel is submitted to me; and my assistants, in collaboration with appropriate officers of the Navy, examine the litigation. If the Navy Department is of the view that information stated in the pleadings or liable to be developed in the course of the trial would be of value to the enemy, admiralty rule 46 authorizes the court to impound the pleadings, to hold the trial in camera and to impound all records in the proceedings. It is possible for this to be effective if the matter is heard by a judge. It is much more difficult for it to be

> effective if it is tried before a jury, and, of course, the rule will not apply if the action is at law. Obviously in trial of cases on claims asserted by seamen because of death, injury, illness, loss of effects, detention, or repatriation, disclosures regarding information and operations of convoys, routes, protection for shipping, etc., might well be made in the course of trial.
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> * * * * *
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> (4) It is further to be noted that these cases will have to be tried largely on depositions. Judges are better qualified by experience than juries to appraise the value of evidence presented in the form of depositions.

That the Congress and the seamen's unions alike thoroughly understood that one purpose of the Clarification Act was to prohibit suit against the Government's agents for negligence of the master and crew, with the consequent jury trial in the state or federal courts, could scarcely be made more plain.

On October 15, 1942, H. Rept. No. 2572, 77th Cong., 2d sess., of the Committee on Merchant Marine and Fisheries, emphasized that while the bill granted government seamen the rights of privately employed seamen, the distinction in the remedy was deliberately made. The report stated at page 14:

> The various rights and remedies under statute and general maritime law with respect to death, injury, illness, and other casualty to seamen, have been rather fully

set forth hereinabove. Under clause 2 of Section 1 (a) these substantive rights would be governed by existing law relating to privately employed seamen. The only modification thereof arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. This procedure is appropriate in view of the fact that the suits will be against the Government of the United States. In such a suit no provision is made for a jury trial as may otherwise be had in a proceeding such as one under the Jones Act for reasons set forth in the letter of the Attorney General. * * *

Other claims under clauses 2 and 3, such as claims for maintenance and cure, collection of wages and bonuses, and making of allotments, shall also be enforced under the Suits in Admiralty Act.

In the Senate, S. Rept. 1655, 77th Cong., 2d sess., of the Committee on Commerce (October 22, 1942), similarly recognized the need for thus modifying the seamen's remedies where government seamen were involved. It stated (pp. 3–4):

The substantive rights under statute and general maritime law with respect to death, injury, illness, or other casualty to seamen employed by the War Shipping Administration would under section 1 be controlled by existing law relating to privately employed seamen. The only modification thereof is that the rights shall be enforced in accordance with the provision of the Suits in Admiralty Act. Other claims, such as claims

for maintenance and care, collection of wages and bonuses, and making of allotments, would also be enforced under that act.

Thereafter, the case of *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, was argued in this Court on December 18, 1942, and decided January 18, 1943. It overruled (317 U. S. at 578) the holding of the *Lustgarten* case (*Johnson* v. *Emergency Fleet Corp.*, 280 U. S. 320) that Government agents were immune from liability even for the independent torts of their own employees merely because Government money would be used to indemnify them in the event of recovery, and held instead that their liability should be no different from that of agents of private ship operators. But although the Roosevelt agreement was an operating agency whereby the Government demised its vessels to the agent as owner *pro hac vice* to man and operate with its own masters and crews, the Court was at pains to point out that "Whether a cause of action against respondent has been established is, of course, a different question" (317 U. S. at 585). *Supra*, pp. 26, 40, 110.

That Congress recognized that the *Brady* case did not materially affect the liability of the general agent acting under the GAA 4-4-42 form of husbanding agreement is evident from the fact that no changes were made in Section 1 of the bill and that on February 8, 1943, H. Rept. No. 107, 78th Cong., 1st sess., of the Committee on Merchant Marine and Fisheries, discussing the new bill (H. R. 133), repeated in substantially identical terms the state-

ment of the previous Committee reports as to the modification in seamen's remedies which Section 1 would bring about. Cf. *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, at 730, fn. 37.

These statements in the hearings and committee reports show that the substantive rights of government seamen were intended by Congress to be the same as those of seamen in private employment, but they also specifically describe the remedy conferred as an important modification. The modification, of course, was that the rights were to be enforced in accordance with the Suits in Admiralty Act against the United States, not by suit at law against the Government's agents.

Further evidence of the legislative intent not to confuse the status of government-employed seamen (who were to be confined to suit against the United States) and privately employed seamen (who might also bring suit against their private employers) appears in certain changes in language made prior to final enactment of the bill. In the form in which the bill originally passed the House, October 19, 1942 (88 Cong. Rec. 8384), Section 1 provided that all seamen employed "by or on behalf of the United States through the War Shipping Administration, *or agents or other persons acting for or on behalf of the War Shipping Administration*, shall, with respect to" death, injuries or other claims have the same rights as if privately employed. The presence of the italicized matter was objected to by the shipping companies as creating "doubt and confus-

ion as to the scope and application of the legislation." They explained, "If it is intended to refer only to seamen who are in the employ of the War Shipping Administration, there would appear to be no necessity of referring to agents or other persons acting on its behalf." House Merchant Marine and Fisheries Committee, Hearings on H. R. 7424, 77th Cong., 2d sess., p. 10. By the time of the passage of the bill by the 78th Congress (89 Cong. Rec. 963), the companies' suggestion was adopted and the language revised so as to omit the italicized matter. The change manifests plainly the Congressional intent to eliminate any possible question of the fact that government-employed seamen, and no others, were to be confined to the remedy against the United States.[7]

3. *The Clarification Act in terms requires that suit be brought only under the Suits in Admiralty*

[7] The debates similarly emphasize that Congress contemplated suits would be brought only against the Government. Senator Overton, discussing an amendment to limit the compensation of seamen's attorneys, stated (89 Cong. Rec. 1920): "This is a bill which provides for the institution of action against representatives of the Federal Government, and I thought it was an opportune time, since the Government was directly concerned, to insert such a provision [for limitation of fees]." Although the Senate later receded from the amendment because opposition had developed (89 Cong. Rec. 1919–20), the introduction of the provision, and its passage by the Senate, as an amendment to "a bill which provides for the institution of action against the representatives of the Federal Government," indicates congressional realization that such suits were to be brought only against the United States.

Act.—Turning to the language of the Clarification Act itself, there can be little doubt that the remedy by suit pursuant to the Suits in Admiralty Act is exclusive.[48] The purpose is evident from the distinction made between "rights" and "remedies", and between claims after its enactment which "shall" be enforced under the Suits in Admiralty Act and those prior to its enactment which "may" be so enforced if the seaman so elects.

The first sentence of Section 1 of the Act confers on government seamen "all of the rights, benefits,

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[48] "Officers and members of crews (hereinafter referred to as 'seamen') employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to * * * (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or reparation, or claims arising therefrom * * * have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to * * * seamen on privately owned and operated American vessels. * * * Any claim referred to in clause (2) * * * hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seamen is employed is not a merchant vessel within the meaning of such Act. Any claim, right, or cause of action or or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration."

exemptions, privileges, and liabilities" possessed by private seamen. The omission of the word "remedies" from this grant shows that while Congress intended to give government seamen the substantive rights available to private seamen, it did not intend to accord them the identical remedies, including the remedy by suit at law with trial by jury which could have been had if suit against the general agent had been authorized. That Congress fully realized that the result of this omission of the word "remedies" would be to confine government seamen to the single remedy of suit against the United States in admiralty is evident from the legislative history of the bill. See *supra*, pp. 118–127.

Section 1 further provides that seamen's claims for death, injuries, illness, maintenance and cure "shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act." The language is explicit and mandatory. Since only the United States is suable under the Suits in Admiralty Act, the use of the word "shall," the language of command, rather than "may," excludes any construction under which suit against an agent of the United States might otherwise be held justified. *Escoe* v. *Zerbst*, 295 U. S. 490, 493. The mandatory character of the word "shall" is confirmed by the contrasting use of the word "may" in the succeeding sentence. In the *Hust* case, this Court held that the latter sentence, which uses the word "may" with reference to injuries incurred by seamen between October

1, 1941, and the effective date of the Clarification Act, authorizes the seaman to proceed either against the United States under the Suits in Admiralty Act or against the general agent under the Jones Act (*Hust* v. *Moore-McCormack Lines*, 328 U. S. at 728). Where the word "shall" is used, as here—immediately before the "election" provision providing what "may" be done in respect of injuries incurred on and after the date of the Act—a contrary result to that in the *Hust* case follows. The Oregon Supreme Court in *Fink* v. *Shepard S. S. Co.* (No. 360, this Term) and the Court of Appeals for the Third Circuit, in *Gaynor* v. *Agwilines* (No. 430, this Term), have so held.[49] Their decisions accord with the well-settled rule that use of the words "may" and "shall" in such close juxtaposition in the same section of a statute implies that each is used in its ordinary sense and not in the sense of the other. *Ballou* v. *Kemp*, 92 F. 2d 556, 560 (C. A. D. C.); *Federal Land Bank of Springfield* v. *Hansen*, 113 F. 2d 82, 84 (C. A. 2).[50]

Further confirmation of the exclusive character of the remedy, pursuant to the Suits in Admiralty

[49] The Court of Appeals for the Ninth Circuit, without discussion, likewise ruled that the United States alone, and not the general agent, is exclusively responsible for a seaman's post-Clarification Act injury. *United States* v. *Lubinski*, 153 F. 2d 1013. The court below is thus alone in the minority.

[50] *Jensen* v. *Lehigh Valley R. Co.*, 255 Fed. 795, 796 (S. D. N. Y.); *Murray* v. *Edes Mfg. Co.*, 305 Mass. 311, 315; *State ex Inf. McKittrick* v. *Wymore*, 343 Mo. 98, 109; *Smith* v. *School District*, 241 Mich. 366, 369; *State ex rel. Wendling Bros. Co.* v. *Board of Education*, 127 Ohio St. 336, 338.

Act, is found in the provision of Section 1 of the Clarification Act conditioning the right to sue under that Act upon the claim being thereto.ore "administratively disallowed." The quoted term is defined by the statute to mean "a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration." The "administrative disallowance" requirement, which makes expressly applicable the fundamental doctrine of exhaustion of administrative remedies, shows that Congress was thinking in terms of a requirement that suits would be brought only against the United States. To allow an alternative remedy by a suit against the general agent would nullify this statutory requirement of prior administrative consideration. Although agents are not mentioned in the Act, as passed, the legislative history of their omission (*supra,* pp. 126–127) clearly excludes the notion that they were regarded by Congress as employers of the Government's seamen or liable to alternate suit as such. Had Congress so regarded them, the Clarification Act would have been unnecessary since the seamen, without additional legislation, would have had full rights to sue and recover from the agents under the Jones Act, with the privilege of jury trial. *Gaynor* v. *Agwilines, Inc.,* 76 F. Supp. 617, 620 (E. D. Pa.), affirmed, 169 F. 2d 612 (C. A. 3), pending on writ of certiorari, No. 430. In the language of the *Fink* case (No. 360) "It would have been wholly unnecessary to accord to seamen in

rivate employment" the rights of seamen in rivate employment" (193 P. 2d at 268).

Finally, the election provision of Section 1 of the Act, respecting claims arising after October 1, 1941, but prior to the date of enactment [March 24, 1943] provides ultimate confirmation of the exclusive character of the remedy by suit against the United States. This retroactive election provision was construed by this Court in the *Hust* case to give government seamen the right to proceed against either the United States or an operating agent for the Government, with regard to claims arising in the designated period. It was pointed out that the need for the elective, alternative remedy on claims antedating the Act may have arisen out of the "uncertainties and complexities" which might otherwise work to the seamen's prejudice in electing his appropriate remedy. 328 U. S. at 720–722. It was recognized that different considerations might apply in the post-Clarification Act period. 328 U. S. at 727, 728, 733.

In the case of claims arising after March 24, 1943, and long after the uncertainties of the change-over from private to government operation were ended, *supra*, pp. 115–118, there can be no such uncertainty. The Act specifically defined the remedies as well as the rights thenceforward available to government seamen. It put them on notice that the United States was assuming full and exclusive responsibility for the torts of its maritime employees, and directed the seamen to sue the United States under

the Suits in Admiralty Act for such torts. Since the bills which became the Act had been considered by Congress during both the 1942 and 1943 sessions, and since representatives of the seamen's unions with which the United States had signed the overall collective bargaining arrangement, participated in the congressional hearings on the bill, the enactment of this rule did not take the seamen and their representatives by surprise, and they were fully aware of the exclusive character of the remedy in cases arising out of post-Clarification Act injuries.

We submit that it is thus plain that the clearly expressed intent of Congress, when it gave government seamen the rights of privately employed seamen, was to restrict the enforcement of the rights thus given to suit against the United States in admiralty. The rights were to be measured by those of seamen in private employment rather than by those of other employees in government service, but since the seamen involved were employees in the civil service of the United States and not employees of private shipping companies, the rights thus given were necessarily to be enforced solely against their employer, the United States.

To fail to recognize this exclusive character of the remedy by suit against the United States under the Suits in Admiralty Act, would be to defeat the considered intention of Congress that for reasons of national security the civil-service seamen on government-operated vessels should enforce their

rights solely in admiralty, where no jury is present and trials can be held *in camera* and the records of the proceedings can be impounded so as to prevent disclosure to the enemy of information detrimental to the national safety and to the lives and safety of the seamen themselves. See *Fink* v. *Shepard S. S. Co.*, 192 P. 2d at 268–269.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the exclusive remedy of government seamen, such as respondent, is by suit against the United States, the operating owner of his ship, and not against petitioner, an agent appointed by the United States solely to operate the accounting and certain other parts of the shoreside business of the vessel, and accordingly that the judgment below should be reversed.

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H. GRAHAM MORISON,
Assistant Attorney General.
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JANUARY 1949.

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

1. The War Shipping Administration (Clarification) Act of March 24, 1943, c. 26, § 1, 57 Stat. 45 (50 U. S. C. App. 1291), provides in pertinent part:

> (a) Officers and members of crews (hereinafter referred to as "seamen") employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, as amended by subsection (b) (2) and (3) of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels. Such seamen, because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act, as amended; the Civil Service Retirement Act, as amended; the Act of Congress approved March 7, 1942 (Public Law 490, Seventy-seventh Congress); or the Act entitled "An Act to provide benefits for the

injury, disability, death, or detention of employees of contractors with the United States and certain other persons or reimbursement therefor", approved December 2, 1942 (Public Law 784, Seventy-seventh Congress). Claims arising under clause (1) hereof shall be enforced in the same manner as such claims would be enforced if the seaman were employed on a privately owned and operated American vessel. Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. Any claim, right, or cause of action of or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration. Rights of any seaman under the Social Security Act, as amended by subsection (b) (2) and (3), and claims therefor shall be governed solely by the provisions of such Act, so amended. When used in this subsection the term "administratively disallowed" means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration. When used in this subsection the terms "War Shipping Administration" and "Administrator, War Shipping Adminis-

tration" shall be deemed to include the United States Maritime Commission with respect to the period beginning October 1, 1941, and ending February 11, 1942, and the term "seaman" shall be deemed to include any seaman employed as an employee of the United States through the War Shipping Administration on vessels made available to or subchartered to other agencies or departments of the United States.

2. The Jones Act of June 5, 1920, c. 250, § 33, 41 Stat. 1007 (46 U. S. C. 688), provides in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *

3. The Federal Employers' Liability Act of April 22, 1908, c. 149, § 1, 35 Stat. 65 (45 U. S. C. 51), as amended, provides in pertinent part:

> every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its * * * boats, wharves, or other equipment.

4. Revised Statute 1753 (5 U. S. C. 631), authorizing the President to prescribe regulations regarding civil service employment, provides:

The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service.

5. The Civil Service Rules and Schedules, as codified in Title 5, Code of Federal Regulations, p. 48 and 1943 Cum. Supp. pp. 1441, 1488 provide in pertinent part as follows:

CIVIL SERVICE RULE II

SECTION 2.1. *Extent of the classified service.*—The classified service shall include all persons who have been heretofore or may hereafter be given a competitive status in the classified civil service with or without competitive examination, by legislative enactment, or under the civil-service rules promulgated by the President, or by Executive orders covering groups of employees with their positions into the competitive classified service or authorizing the appointment of individuals to positions within such service. It shall include all positions now existing or hereafter created by legislative or Executive action, of whatever function or designation, whether compensated by a fixed salary or otherwise, unless excepted from classification by specific affirmative legislative or Executive action. No right of classification shall accrue to per-

sons whose appointment or assignment to classified duties is in violation of the civil-service rules. [E. O. 7915, June 24, 1938, effective Feb. 1, 1939; 3 L. R. 1519.]

* * * * * *

SECTION 2.3. *Exceptions from classification.*—(a) Positions in Parts 50 and 51 are excepted from the classified service.

(b) Appointments to the excepted positions named in Part 50 may be made without examination or upon noncompetitive examination. * * * [E. O. 7915, June 24, 1938, effective Feb. 1, 1939, as amended by E. O. 8083, Apr. 10, 1939, effective May 1, 1939; 3 F. R. 1519, 4 F. R. 1577.]

* * * * * *

SECTION 50.0. *Certain positions excepted from examination under § 2.3.*—The positions designated in this part are excepted from examination, but not more than one position shall be treated as excepted under any title unless a different number of positions be indicated (Rule XVI, sec. 1, E. O. 209, Mar. 20, 1903, 5 C. F. R. 16.1) [Regs. CSC, as of June 1, 1938].

* * * * * *

SECTION 50.21. *United States Maritime Commission.*—(a) All positions on Government-owned ships operated by the United States Maritime Commission [E. O. 9004, Dec. 30, 1941; 7 F. R. 2].

NOTE: These positions were transferred to the War Shipping Administration by E. O. 9054; 7 F. R. 837.

6. War Shipping Administration Operations Regulation No. 12, Supplement 1, provides as follows:

OPERATIONS REGULATION NO. 12

Supplement No. 1, October 7, 1944

Pertaining to All Vessels Owned by or Under Charter to the War Shipping Administration (Dry Cargo and Passenger Vessels, Tankers, Colliers, and Small Craft)

Subject: Employee Status of Certain Personnel Employed by Agents

This Supplement No. 1 to Operations Regulation No. 12 is issued for the purpose of clarifying the employment status of certain personnel employed by Agents in the conduct of the business of vessels or their cargo under the GAA, TCA, and BA agreements.

It is clear from the provisions of Article 3A (d) of the General Agency Service Agreement that Master and crew members are employees of the United States but, no specific provision is made in the GAA, TCA, or BA agreements as to whether other personnel are employees of the United States or of the Agents, General Agents, or Berth Agents. Reading the provisions of the agreements as a whole it is also clear that, except for the Master, officers, and crew, persons employed by an Agent, General Agent, or Berth Agent are employees of such Agents and not of the United States.

1. Excepting only additions to the vessel's crew and employees of independent contractors, personnel employed by General Agents pursuant to Operations Regulation No. 12 are employees of the General Agent and not of the United States. Other personnel directly employed by Agents, General Agents, and Berth Agents, (and their Sub-Agents) to perform work in connection with vessels or their cargo and special work incident thereto, including shore gangs, checkers,

tallymen, watchmen, guards, coal trimmers, and other extra labor, but excluding relief officers, shore relief, and crew members, are employees of such Agents and not of the United States.

2. The direct labor costs of the employees of Agents referred to in paragraph 1 shall be paid for from the corporate funds of the Agents, and, in accordance with Article 7 of the service agreements, the Agent may reimburse himself for such expenses from the special bank account established for use in connection with the service agreements. Such costs shall include, but without limitation, taxes (employer's contributions only) payable pursuant to the Federal Insurance Contributions Act (OAB tax) and to any state or federal unemployment insurance law in respect of the direct labor to which the same may be applicable; and premiums on workmen's compensation insurance carried pursuant to the Federal Longshoreman's and Harbor Workmen's Compensation Act and any state workmen's compensation laws in respect of the direct labor to which the same may be applicable. Such costs shall not include compensation for supervisory services or overhead of the Agent.

3. With respect to the work performed by the employees of Agents referred to in paragraph 1, the Agent shall be indemnified to the full extent provided under the applicable service agreement, regardless of the fact that the employees in question are employees of the Agent and not of the United States.

4. The interpretation and instructions contained in this Regulation need not be applied retroactively by the Agents.

(Sgd.) G. H. HELMBOLD,
Assistant Deputy Administrator for Ship Operations.

APPENDIX B

THE LETTER OF THE GENERAL COUNSEL, UNITED STATES MARITIME COMMISSION, IN REPLY TO THE ENQUIRIES OF THE COURT IN CALDAROLA *v.* ECKERT, 332 U. S. 155

UNITED STATES MARITIME COMMISSION,
Washington, April 28, 1947.

Honorable JOHN F. SONNETT,
Assistant Attorney General,
Department of Justice,
Washington 25, D. C.

SIR: This has reference to the request of your Department in connection with the case of *Caldarola* v. *Moore-McCormack Lines, Inc., et al.*, that the Maritime Commission as successor to the United States Shipping Board and the War Shipping Administration, supply additional information for the use of the Supreme Court. It appears that you desire to be informed why the War Shipping Administration, instead of entering into managing-operator agreements, such as had been used by the Shipping Board and the Maritime Commission from the close of wartime government operation in 1920 until the final sale of the Government's merchant fleet in 1940, decided to adopt service agreements whereby it employed existing steamship companies as its agents to conduct the business of the vessels. You also request an explanation of the differences between the standard form service agreement GAA 4-4-42 adopted by the War Shipping Administration and the former

managing-operator agreements, together with a statement as to the manner in which the vessels were operated and serviced under the various integrated contracts of the War Shipping Administration.

CONGRESS AUTHORIZED DIRECT GOVERNMENT OPERATION

It must be understood at the outset that direct government operation of the government merchant fleet was believed indispensable to the war effort in both World Wars. It was accordingly specifically authorized by the Congress and the arrangements which were made for direct government operation with the assistance of experienced steamship companies as ships' husbands for the servicing of the vessels and as berth agents for the handling of port services arising out of their operations on the various routes were deliberately chosen from that point of view. As is evident from a comparison of the new standard form agreements, this type of operation constituted a significant change from the method of operating government vessels which had been in force from January 1920 until the sale of the last of the government lines in May 1940 and marked a return to the direct government operation of World War I.

The effect of the old peacetime operation, particularly subsequent to 1929, is best summarized by the Shipping Board in its Annual Report for 1929. There, in explaining the purpose of the operating agreement which it had adopted, the Board stated (p. 95):

> By this plan, the operator assumes complete physical and financial control of the operations of the line, and the Merchant

> Fleet Corporation confines its activities to periodic inspections covering the maintenance of service in accordance with the contract and the physical condition of the ships. For the services of the operator in maintaining the line, a lump sum amount is paid, the amount to be determined for each line by analysis of recent operating results. This form of agreement places the managing operator upon as nearly a privately owned operating basis as is practical and should pave the way for the eventual sale of the lines.

This referred to what was ultimately known as the "Lump Sum Operating Agreement, 1930" which was considered in the reports of the Black Committee (S. Rep. 898, 74th Cong., 1st Sess.) and the Comptroller General (H. Doc. 217, 72d Cong., 1st Sess.). Its text is printed in full in Smith and Betters, *U. S. Shipping Board, its history, activities, and organization*, pp. 293–302. Earlier forms are printed in S. Doc 38, 67th Cong., 1st Sess., pp. 60–65.

The normal peacetime scheme of operation which, following the Black report, Congress directed in the Merchant Marine Act, 1936, required the Commission to arrange for the charter of the government-owned merchant fleet by private steamship companies. Section 704 (46 U. S. C. 1194) provided:

> All vessels transferred to or otherwise acquired by the Commission in any manner may be chartered or sold by the Commission pursuant to the further provisions of this Act. All vessels transferred to the Commission by this Act and now being operated by private operators on lines in foreign com-

> merce of the United States shall be temporarily operated by the Commission for its account by private operators until such time and upon such operating agreements as the Commission may deem advantageous, but the Commission shall arrange as soon as practicable to offer all such lines of vessels for charter as hereinafter provided; preference to be given to present operators, and all operations of the Commission's operation by private operators shall be under such operating agreements discontinued within one year after the passage of this Act.

But in order to assure operation of lines which the Commission might deem essential, but for which it might be impossible to find private operators willing to assume the financial risk of operation under bareboat charter, Congress provided in Section 707, as amended (46 U. S. C. 1197), that the Commission itself might operate such lines through private operators under such operating agreements as the Commission might find advantageous. It was under exceptional arrangements of this character that the special operating agreements with the Roosevelt, Southgate-Nelson and two other operating companies were continued by the Commission until final sale of the government lines in 1940. And it was these special agreements which were involved in the cases of *Brady* v. *Roosevelt S. S. Co.*, 317 U. S. 575, and *Quinn* v. *Southgate-Nelson Co.*, 121 F. 2d 190, cert. den. 314 U. S. 682. The text of the special Roosevelt agreement is printed in full in the Brady record October Term 1942, No. 269, pp. 21–32.

In order to meet potential war conditions, Congress, by the Act of August 7, 1939, c. 555, 53 Stat.

1255 (46 U .S. C. 1242 (e)), amended the Merchant Marine Act and conferred special powers upon the Commission with respect to vessels requisitioned or purchased in case of national emergency. In particular Congress authorized the Commission "to repair, recondition, reconstruct, *and operate*, or charter for operation, any vessels acquired" under such authority. By Section 4 of the Act of June 6, 1941, c. 174, 55 Stat. 244 (50 Appx. U. S. C. 1274), Congress further recognized the developing national emergency and expressly directed that any vessels acquired or made available to the Commission might be "operated by the Commission upon such terms and conditions as it may deem desirable and in the public interest, giving primary consideration to the needs of national defense." Finally, following the outbreak of hostilities, President Roosevelt by Executive Order 9054 of February 7, 1942 (3 C. F. R. 1943 Cum. Supp. 1086), issued pursuant to the First War Powers Act of December 18, 1941, c. 593, 55 Stat. 838 (50 Appx. U. S. C. 601), established the War Shipping Administration under the direction of an Administrator. Paragraph 2 of that order directed the Administrator to control the "operation, purchase, charter, requisition, and use of all ocean vessels under the flag or control of the United States" with the exception of vessels under the control of the military or naval authorities. By paragraph 3 it also transferred to the Administrator all duties and authority with respect to the operation of vessels which had previously been conferred by law upon the Maritime Commission.

The mandate for wartime operation thus granted the War Shipping Administration was entirely different from the peacetime functions of the Shipping Board and the Maritime Commission as directed by earlier legislation culminating in the Merchant Marine Act, 1936, and carried out by means of the operating agreement employed from 1920 to 1940. On the contrary, the type of operation authorized was analogous to the direct government operation followed during World War I by the Shipping Control Committee of the Shipping Board with the aid of the Division of Operations of the Fleet Corporation. Then President Wilson, by Executive Order 2664 of July 11, 1917, issued pursuant to the emergency provisions of the Act of June 15, 1917, c. 29, 40 Stat. 182, had conferred similar authority upon the Shipping Board to assume "the operation, management and disposition" of all vessels acquired by the United States. The Board, in its turn, by resolution of February 11, 1918 (H. Rept. 1399, 66th Cong., 3d Sess., p. 32), had created the Shipping Control Committee "empowered to manage, control, distribute and allocate all tonnage now subject or which hereafter may become subject to the control of the United States Shipping Board by ownership, charter or otherwise." And the direct governmental wartime operation that followed is now history (see Crowell and Wilson, *Road to* France, pp. 377–378; Smith and Betters, *U. S. Shipping Board, its history, activities and organizations*, pp. 24–25, 29–30).

It should be common knowledge that the basic reason for the War Shipping Administration following a plan of operations whereby it manned and

navigated the Government's vessels was the conviction that it was essential to the conduct of the war to make the navigation and physical management of the vessels afloat an exclusively government operation. But equally it was desirable to take advantage of the existing contracts and experienced personnel of steamship companies for servicing the shoreside needs and administrative affairs of the vessels and obtain the benefit of their existing agreements with the maritime unions for procuring masters and crews. From a review of the War Shipping Administration files it would seem that the following points were deemed particularly essential:

1. Insure immunity from foreign and local inspection, regulation, and taxation for the vessels and their operation.

2. Retain direct control of the routing, navigation and physical management of the vessels and of their masters and crews but not necessarily of their procurement for employment.

3. Provide a mechanism for direct control of fueling, supplying, repairing and similar services and for immunity from foreign and local regulation and taxation of such activities.

These points could be best attained only by direct government operation. Operation of the vessels by independent contractors would not fulfill the requirements.

When War Shipping Administration assumed this task of operating the Government's merchant fleet, the then existing scheme of the government was to bareboat charter vessels to private operators. The onset of war led to a general program of requisition and to acquisition of a vast number of vessels of all types through purchases and the stepping

up of our construction program. The problem presented under these new conditions was how to carry out the mandate granted by Executive Order 9054 "to control the operation * * * and use of all ocean vessels" as a coordinated major governmental program while at the same time taking advantage of the existing organizations in the various ports which the steamship lines had created. Efficient wartime operation required speed and secrecy. It was indispensable to escape the detailed inspections, reports and accounting which foreign, and to some extent local, governments impose on private vessel operation in aid of their police, regulation and taxation powers. Only direct government operation would support the claim of sovereign immunity and permit escape from such delays and publicity. But efficient operation just as obviously dictated a policy of full utilization of the technical skill and facilities of shipping organizations, which had been painstakingly encouraged by the Commission's aid over a long period of years, precisely in order that they might be utilized by the public in just this type of emergency. Such organizations, developed in peacetime by private shipping companies, consist of highly skilled personnel trained to work smoothly and closely together. Their technical personnel have complete familiarity with the terminals, connecting carriers, loading and unloading conditions, as affected by port, sea and weather conditions, and with all other problems inherent in overseas transport in the various trades. They are familiar as a team with the various techniques and skills of such shoreside matters as towage, wharfage and stevedoring practices, maintenance and voyage repairs and countless other minor port operating details

which, unless efficiently handled, result in substantial loss of time, money and ship-space. Such organizations also have access to a supply of ship and shore personnel as a result of their union agreements and other connections. It was obvious that the only workable solution was a twofold division of duties; the navigation and physical management of the vessels afloat was to be carried out by ship masters acting directly as agents or employees of the United States and in exclusive control of their vessels and crew; the port services, the husbanding of the vessels and the details of shore side administration were to be carried out by existing shipping companies acting not as independent contractors but solely as agents for the United States.

The nature of such agency arrangements was especially important in connection with foreign taxation and regulation. For example, not even an act of Congress might have been sufficient to preserve immunity of the vessels if the general agents were made independent contractors and placed in possession of the vessels. Cf. *Mexico* v. *Hoffman*, 324 U. S. 30, 37. As Admiral Land stated in a circular instruction of June 10, 1942, addressed to all agents and general agents with respect to tax immunity:

> When the forms of Service Agreements (GAA and TCA) were drafted, and later when they were approved by me for use as standard forms, it was contemplated that Agents and General Agents who executed them would act as agents for the United States, and not as independent contractors, in conducting the business of the vessels allocated to them (see Articles 1 and 2). It was also contemplated that, since the agents were

authorized to make purchases necessary to the maintenance, management, and operation or conduct of the business of the vessels, the purchases would be made in the name of the United States as principal, that title to the goods purchased would vest in the United States, and that the United States, and not the Agent, would be obligated to pay the purchase price and its credit would be pledged therefor.

See also previous circular instructions, dated May 19, 1942, by the Director of Fiscal Affairs.

Of all the various aspects covered by the discussions that attended the drafting of the service agreements necessary to carry out the plan for wartime operations, the question of whether the crews were to be employees of the United States or of the general agent received most particular attention. Aside from the propriety of a Government agency, as employer, negotiating directly with labor unions or entering into collective bargaining agreements, the practical difficulties of so doing were almost insuperable due to the large number of labor organizations and the consequent variations as to wages, working conditions, and other matters which existed in the maritime industry as a result of a long history under private operation. It was recognized that, for at least the early years of the war, the requisitioned vessels would represent a vast majority of those under government control and the transition from private to direct government operation could be best achieved only by arrangements which provided for a minimum disturbance of existing collective bargaining relationships. On the other hand, there was no doubt that as the general agents would not be owners nor bareboat charterers

of the vessels they could not claim the benefit of the limitation of liability acts (46 U. S. C. 181 *et seq.*) as the law then stood. Compare Section 4 of the War Shipping Administration (Clarification) Act (50 Appx. U. S. C. 1924), extending the benefits of the acts. General agents, while willing to assist in procurement, were reluctant to accept the unlimited liability which would result from the masters and crews being their agents or employees. Moreover it was believed that crews would have greater sense of responsibility and would be more likely to refrain from strikes and other work stoppages if they were employees of the United States. Finally, only if the masters and crews were government employees could the United States be certain of its right to invoke sovereign immunity abroad and to insist at home that all litigation involving the navigation and management of the vessel should be in the admiralty courts where necessary wartime secrecy could be preserved.

Ultimately a plan was developed similar to that stated in Section 79, comment a, of the Restatement of Agency. It was determined that the general agent, acting as agent for the Government, should procure masters and crews to man the vessels. It was to be expressly provided that they should be procured pursuant to the applicable union agreements and in accordance with customary commercial practices. It would thus be possible to retain the advantage of existing union agreements without sacrificing the advantages arising out of the status of the masters and crews as government employees subject to the exclusive control of the United States.

Pursuant to the plan thus evolved, the War Shipping Administrator adopted forms of service agreements whereby existing steamship companies were appointed general agents to husband vessels to be assigned to them and operators of existing steamship lines were appointed berth agents to handle the cargo activities and other port services required by vessels assigned to the routes established. These service agreements were promulgated by the Administrator in General Order No. 21 of September 22, 1942 (7 Fed. Reg. 7561), and its supplements. An examination of the texts of the two agreements and a consideration of the complementary functions which they assign to the general agent and berth agent in attending to the service of the vessel on shore shows conclusively that neither agent is in control of the vessel but that the United States alone, as the principal both of the vessel's master and of the general agent and berth agent has full control.

The general agency agreement, form GAA, 4–4–42, in effect at the time Caldarola was injured (printed in Document 4, Plaintiff's Exhibit 7, pp. 326–336), provided in pertinent part as follows:

> ARTICLE 1. The United States appoints the General Agent *as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned* to it by the United States from time to time.
>
> ARTICLE 2. The General Agent accepts the appointment and undertakes and promises so *to manage and conduct the business for the United States,* in accordance with such directions, orders, or regulations as *the latter has prescribed,* or from time to time *may prescribe.* * * *

ARTICLE 3A. To the best of its ability, the General Agent shall *for the account of the United States*:

(a) Maintain the vessels in such trade or service *as the United States may direct*;

(b) Collect all moneys due the United States * * * and account to the United States for all moneys collected or disbursed * * *;

(c) Equip, victual, supply and maintain the vessels, subject to such directions, orders * * * and inspection *as the United States may from time to time prescribe*;

(d) * * * The Master *shall be an agent and employee of the United States and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel.* The General Agent shall procure and *make available to the Master for engagement by him* the officers and men required by him to fill the complement of the vessel * * * *The officers and members of the crew shall be subject only to the orders of the Master.* All such persons shall be paid in the customary manner with *funds provided by the United States hereunder.*

It was complemented by the berth agency agreement, form BA 12–29–43, in effect at the time Caldarola was injured (*ibid.*, pp. 367–374), which provided in pertinent part as follows:

ARTICLE 1. The United States appoints the Berth Agent *as its agent and not as an independent contractor, to conduct the business of vessels* assigned to it by the United States from time to time.

ARTICLE 2. The Berth Agent accepts the appointment and undertakes and promises so *to conduct the business for the United States,* in accordance with such directions,

orders or regulations *as the United States has prescribed*, or from time to time may prescribe. * * *

ARTICLE 3A. Unless otherwise directed by the United States, the Berth Agent, in all cases, shall, to the best of its ability, for the account of the United States:

(a) Perform all of the customary duties of an agent in conducting the business of the vessels subject to this Agreement, subject to the orders of the United States *as to voyages, cargoes, priorities of cargoes, charters, rates of freight and other charges and as to all matters connected with the use of the vessels;* * * *

(b) Collect all moneys due the United States under this Agreement and deposit, remit, or disburse the same in accordance with such regulations as the United States may prescribe from time to time, and account to the United States * * *

(c) *Provide and pay for all fuel, fresh water, stevedoring and other cargo handling expense, port charges, wharfage and dockage, pilotages, agencies, canal dues, commissions, and consular charges,* except those pertaining to the Master, officers and crew, * * * Provided, That, where the United States has entered into agreements for any of the foregoing items (such as for stevedoring and supplying fuel), the Berth Agent shall see that the items are furnished pursuant to the provisions of such agreements and shall make the necessary arrangements with the District Manager, or other representative of the United States therefor.

(d) *Issue or cause to be issued to shippers customary freight contracts and bills of lading in the form prescribed by the United States,* and prepare manifests and other documents. Where appropriate, issue or

cause to be issued to passengers customary passenger tickets in the form prescribed by the United States.

In view of the fact that as to some of the vessels the same person might act both as general agent and as berth agent and the fact that vessels at times would be in ports where it would be necessary for the berth agent to perform the duties of husbanding the vessel, a certain overlapping of duties and powers was necessarily provided for. However, none of these powers infringed upon the absolute control of the United States through the master over the navigation and physical management of the vessel. No conflicts could arise from this overlapping of duties between the general agent and the berth agent because they were avoided or resolved in practice by specific orders of their common principal, the United States. The clear line of authority vested in the master from the United States as contrasted with the overlapping duties of general agents and berth agents, indicates clearly that the master was directly responsible to the United States and not to the general agent or berth agent.

DIFFERENCE FROM COST-PLUS CONTRACTOR AGREEMENT

Analysis of the differences between the general agency agreement, on the one hand, and the agreements which turned the vessels over to private contractors for operation, on the other, confirms that the control of the navigation and physical management of the Government's vessels, as distinct from services in attending to their business on shore, was in the United States and that the general agent no more than the berth agent was permitted to have

any control over the navigation and physical management of the vessels. As typical of the latter group of contracts we may take that with the Roosevelt Steamship Company, which was before the court in the *Brady* case, and the "Lump Sum Operating Agreement, 1930," which was before the Black Committee in 1935. As indicated above, the texts of both are readily available to the Court.

Article 1 of the general agency agreement expressly states that the Government appoints the general agent "as its agent and not as an independent contractor," to "manage and conduct the business of the vessel." On the contrary, paragraph 1 of the Special Roosevelt agreement provides that the "managing agent" is appointed "to manage, *operate*, and conduct the business of the line"; and paragraph 3 states that the vessels are allocated "for management and *operation*." The 1930 agreement employed a similar form and in addition in paragraph 14 provides that the "managing operator" shall "assume control" of "the management and operation of the vessels." Significantly, such provisions are carefully excluded from the general agency agreement.

Article 3A (a) of the general agreement provides that the general agent shall maintain the vessels in such trade as the United States may direct. The Government is thus entirely free to issue and did issue detailed orders concerning routes, voyages, cargoes, rates of freight and all similar matters. The special Roosevelt agreement, on the other hand, within the limitations of paragraphs 4 and 5, concerning the number of sailings on the precise trade routes specified and the necessity for contracting in the trade name of the line, leaves the entire

operation to the contractor's discretion. Paragraph 5 of the 1930 agreement is similar in effect. Both leave the times and conditions of the sailings entirely to the discretion of the operator.

Article 3A (c) of the general agency agreement requires the general agent to "equip, victual, supply and maintain the vessels" as directed by the United States, and 3A (d) requires the general agent to procure the master and crew. But it is provided that, once procured, the master "shall be an *agent and employee of the United States* and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel" and that "the officers and members of the crew shall be subject only to the orders of the master." Finally it directs that they shall be paid with funds provided by the United States. No corresponding language exists in the old agreements. Paragraph 7 of the Roosevelt agreement requires the managing agent to "*man,* equip, victual, supply and *operate* the vessels." Paragraph 8 of the 1930 agreement provides, "The Managing Operator shall, *at his own expense, man, operate,* victual, *navigate,* fuel, and supply the vessels, and shall pay all port charges, pilotage, taxes, and all other costs and expenses." The only restriction upon the operator in the old forms is that the licensed officers and chief steward are to be subject to the Government's approval.

Article 8 of the general agency agreement states that the United States will provide insurance against all insurable risks including marine, war and protection and indemnity risks, "which insurance shall include the general agent and the vessel personnel as assureds." Paragraph 14 of the spe-

cial Roosevelt agreement and paragraph 20 of the 1930 agreement, on the other hand, required the Government to provide all marine insurance, but required the operator to provide all protection and indemnity and similar form of insurance which the Government may deem necessary. Protection and indemnity insurance covers the vessel's liability for personal injury to crew members and others and for damage to cargo. The function of providing it is ordinarily placed upon the party responsible for the navigation and management of the vessel. The retention in the United States, by the general agency agreement, of the function of providing protection and indemnity insurance is significant as showing that the navigation and physical management of the vessel is completely divorced from the functions of the general agent in husbanding the vessel and attending to its shoreside activities.

Article 1 of the general agency agreement provides that, unless otherwise instructed and "subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States," the general agent shall "arrange for the repair of the vessels" and cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable. Article 3A (c) imposes a general duty of maintenance. Paragraph 11 of the special Roosevelt agreement similarly requires the managing agent to "exercise reasonable care and diligence to maintain the vessel." But paragraph 12 of the Roosevelt agreement further provides that the Government shall have the right "to survey any of the vessels op-

erated by the managing agent hereunder to satisfy itself that they are being properly maintained" and requires the managing agent "to give such representatives as the owner may designate from time to time full, free and complete access at all reasonable times to all parts of the vessels." Paragraph 9 of the 1930 agreement provides that "The Managing Operator shall, at its own expense * * * keep said vessels * * * in substantially the same condition as when delivered," and paragraph 5 reserves the right for the Government to survey the vessels at any time. Such provisions for access to the vessels, although essential in the earlier agreements when the United States was not in possession of the vessels, were obviously unnecessary in the 1942 general agency agreement since the master "as agent and employee of the United States," exercising full control "with respect to the navigation and management of the vessel," would hold possession of the vessel for the United States and subject to its access at all times.

The financial arrangements for the vessels also tend to confirm that under the general agency agreement the vessels are in the exclusive control of the Government. The Lump Sum Operating Agreement, 1930, provides that the managing operator shall pay all expenses of operation and in paragraph 18 states that he "agrees to assume for his own account all losses incurred in the operation" and that any profits shall be his property. The Operator's compensation is fixed by paragraph 21 at a lump sum for each voyage. The Roosevelt agreement, on the other hand, provides in paragraphs 6, 7 and 19 for an ordinary cost-plus-fixed-fee type of operation. Article 7 of the general agency agreement,

by contrast, not only requires the United States to reimburse the general agent "for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder," but, moreover, provides that the United States may advance moneys "to provide for disbursements hereunder in accordance with such regulations" as it shall prescribe. In fact, in accordance with the practice codified in Fiscal Regulation No. 6 (Revised), January 1, 1944, all expenses are paid directly from funds of the United States placed in special deposit accounts provided for in the forms found at pp. 386–394 of Document 4 (Plaintiff's Exhibit 7). As compensation, Article 5 of the general agency agreement allows "such fair and reasonable amount" as the Administrator shall from time to time determine. At the time Caldarola was injured compensation was fixed by War Shipping Administration General Order No. 34, December 31, 1943 (9 Fed. Reg. 1059). The basic amount totaled $80 per day per vessel for husbanding and accounting services. General agents and berth agents performing berth or port services are also compensated by certain amounts measured by the cargo and passengers loaded or unloaded. All compensation is subject to recapture or renegotiation to the extent found to be excessive. Under both the Roosevelt agreement and the general agency agreement the losses and profits of the operators fall upon the United States. The general agency agreement, however, differs in that the agent is no longer, as in the old forms, an independent contractor, "managing agent" or "managing operator." The general agent is re-

stricted to being a ship's husband acting merely as an agent and under detailed government control.

OPERATION UNDER THE 1942 AGREEMENTS

It is obvious from the foregoing analysis that general agents and berth agents in the operation of War Shipping Administration vessels are mere agents limited to the performance of shore side or nonnavigating functions under general supervision and are not allowed the board discretion exercised by independent contractors in control or possession of the vessels. The general agency and berth agency agreements alike made every action of agents subject to "such directions, orders or regulations" as the Government should prescribe. And in fact the various activities of the agents were subjected to control through the medium of general orders, operations regulations, traffic regulations, fiscal regulations, legal bulletins, auditing and accounting instructions, insurance instructions and medical directives and through supervision by the War Shipping Administration with the aid of some 5,000 employees located in the principal ports, as well as at Washington. The discretion of agents is particularly circumscribed by three practices followed by the War Shipping Administration in operating the Government's merchant fleet: (1) The appointment of both general agents to render husbanding services and berth agents to render port services to the vessels, (2) the Government's execution of master contracts for the principal services and supplies needed for the vessels, and (3) the requirement of Article 3A (d) that the master be an agent of the United States and not of the general agent and the crew subject only to the orders of the master. Such

practices are, of course, entirely foreign to operation by independent contractors; as well as to private peacetime operation, for in those the independent contractor or private operator enjoys unlimited discretion in the sources and methods of services and supply.

The restrictions resulting from the combined use of berth agents and general agents are many and War Shipping Administration operations bear little resemblance to peacetime operations. Succinctly stated just as general agents are charged with the function of arranging for maintaining and supplying the vessels for the account of the United States, so berth agents are charged with the correlative function of arranging for the account of the United States the port services required at each end of the route. The general agent "husbands" the vessel, consisting principally of victualing, supplying, maintaining and repairing, while the berth agent performs "port services," consisting principally of arranging for the handling and loading of cargo. At foreign ports, moreover, the berth agent, in addition to the cargo services, arranges for all husbanding services required.

Berth agents were generally chosen for routes over which they had previously operated vessels during peacetime and had developed organizations familiar with the local problems peculiar to such routes and the conditions of loading and discharge at their ports. They were appointed on the basis of their special competence for handling special routes. General agents were appointed on the basis of their experience in husbanding vessels. Many companies acted both as general agents and as berth agents but their functions only coincided where

vessels assigned to them as general agents were operated over routes assigned to them as berth agents. The delineation of the duties of general agents and berth agents is fully set forth in War Shipping Administration Operations Regulation No. 84,[1] but may be conveniently illustrated by an example. Thus assume that the A Steamship Company was designated general agent of the United States to husband a vessel, S.S. *Eks*. At the same time it was designated as berth agent of the United States for the New York to United Kingdom route over which it had been a peacetime operator. Thereafter the A Company would act as berth agent for any vessels, no matter what general agent might husband them, which operated on its route—both while the vessels were at New York and when they arrived in the United Kingdom. And it would do so again on their return to New York if the representative of the War Shipping Administration in the United Kingdom who had charge of rerouting directed the vessels to return to New York. When the *Eks* operated on that route, A Company, as general agent, would therefore render berth agency services to it without special designation as berth agent. Now assume the B Steamship Company was designated as berth agent for a route from the Gulf of Mexico to the United Kingdom. When the *Eks* was assigned to make a voyage to the United Kingdom from a port in the Gulf of Mexico, the B Company, the regular berth agent for that route, and not the A Company, the ship's husband, would act as berth agent for the vessel both in the Gulf of Mexico and on its arrival in the United Kingdom.

[1] The text of Operations Regulation No. 84, referred to, was attached and is printed *infra*, pp. 171–176 *et seq.*

And this even though the A Company, the general agent for the *Elks*, was acting as berth agent in the same port in the United Kingdom for vessels on its New York-United Kingdom route. In other words, although a general agent is acting as berth agent in the United Kingdom for vessels from United States North Atlantic ports, it will not act as berth agent for vessels arriving from a United States Gulf port even though the vessels should be among those assigned to it as general agent. Conversely, the B Company, acting as berth agent for the Gulf of Mexico-United Kingdom route, and not the A Company, the general agent, would perform the duties of husbanding the *Eks* in the United Kingdom.

The powers of general agents and berth agents were alike restricted when vessels entered the immediate war zone areas. In those cases the Government performed all such services either by the military authorities or by the War Shipping Administration's own foreign service representatives. (Organized under War Shipping Administration Administrative Order 2, Supplement 4, September 26, 1942, and 4A (Revised), see also Administrative Order 52, December 3, 1943.) At the height of operations, War Shipping Administration maintained a staff of 675 employees located in almost every foreign port in the world in which its vessels were operating. Operating regions, headed by a Regional Director reporting directly to the War Shipping Administrator, were set up to cover all foreign areas. Port representatives, port engineers, and, in some cases, supplemental administrative and legal personnel were assigned at important ports in such areas to carry out the functions of the War Shipping Administration. Foreign service

personnel was transferred from port to port as the war theatres changed and new fronts became active. Even at present, in Japan and Korea, no American steamship companies have been permitted to operate. The business of Government merchant vessels operating in those areas is still handled exclusively by the foreign service representatives of the Maritime Commission as successor to the War Shipping Administration, operating through the military authorities.

General agents were further restricted in the extent of their authority by the action of the Government in entering into master contracts for the procurement of various services and supplies required by general agents and berth agents for husbanding the vessels and affording them port services. Thus, master contracts for repairing, terminal operation, stevedoring, bunkering, and food stockpiling were entered into by the Government. (See pp. 408–583 of Document 4, Plaintiff's Exhibit 7.) All repairs to vessels under general agency agreements were performed under one of several types of repair contracts (pp. 408–496), which included both master contracts for principal repairs and special contract forms to be used by agents in contracting in the name of the United States for isolated repairs when repair contractors under master contracts were not available. Eventually, all oil bunkers and diesel fuels supplied were delivered to the master of the vessel pursuant to orders placed by the general agent on his requisition under contracts designated Warshipfuel and Warshipdiesel (pp. 550–554). A contract designated Warshipfood (pp. 556–564) was also prepared and executed in various ports to assure ade-

quate supplies of scarce foods for vessels. Similar arrangements were made in respect to towage services in various ports (Operations Regulation 27 and supplements).

Even in the absence of master contracts, the War Shipping Administration instructed agents in many respects as to the terms of the contracts they were authorized to make. In accordance with the agency agreements, the provisions of Legal Bulletin No. 1 (September 22, 1942) and General Order No. 42 (9 Fed. Reg. 4110), such contracts for vessel supplies and services were required to be executed in the name of the United States and agents were referred to in that capacity only. It is believed attention should be drawn to the provisions of certain Operations Regulations and their supplements, particularly Nos. 27 (Towage Contracts), 84 (Duties of Berth Agents, General Agents, and Agents), 97 (Bunker Oil Contracts), 99, Supplements 1 and 2 (Pilferage). While some of these regulations were issued subsequent to the date of Caldarola's injury, the procedures codified therein had been established at an earlier date. The close character of the control exercised over general agents and berth agents is further indicated by the duties assigned to the various units of the War Shipping Administration Division of Operations as indicated in Administrative Order No. 50 together with Supplements 1, 8, 13 and 17 thereto.

The most significant restriction on general agents is the lack of control over the masters and crews serving on vessels assigned to them which results from the requirement of Article 3A (d) that the master shall be the agent of the United States, not of the general agent, and in the exercise of his

duties in the navigation and management, has exclusive control over the vessel and its crew. General agents are thus confined to procuring the crews and serving as the channel of command between the War Shipping Administration and the master. In 1942, at the commencement of War Shipping Administration operations, collective bargaining agreements between the maritime unions and the steamship companies were continued in force in accordance with the so-called Statements of Policy of May 4 and May 12, 1942, signed jointly by representatives of the Administration and the unions (see War Shipping Administration Operations Regulation No. 1).[2] Subsequent changes in wages and working conditions were approved by the War Shipping Administration, and where required, by the War Labor Board, before being placed in effect by the Administration. Moreover, a Division of Maritime Labor Relations was created by Administrative Order 20 of June 10, 1942, for the purpose of handling labor relations problems arising in the course of operations and insuring the continuance of proper labor relations.

The relationship between the seamen and the vessel is brought home to them in such a way that they can never have any reasonable doubt that they were serving on United States-owned and operated vessels. The articles of employment signed by the seamen designate the United States as the owner of the vessel and the general agent as its agent. Thereafter he is directly supervised and controlled by the master throughout the entire course of the

[2] The text of Operations Regulation No. 1, referred to, was attached and is printed in the record in the *Fink* case, No. 360, this Term, at pp. 188–191.

voyage. A certificate of ownership as well as a copy of the articles is conspicuously posted on board and seamen are thus constantly aware that they are serving on a vessel owned and operated by the United States. Upon termination of the voyage wages are paid to members of the crew by the master in the presence of a Shipping Commissioner. Funds for the purpose are made available to the general agent by the Administration through deposit in the special joint bank accounts set up in the name of the agent "as general agent for the War Shipping Administration." These procedures inevitably brought home to the seaman his status was that of an employee of the United States.

It is believed that the above explanation of the roles of berth agents and master contracts and the status of masters and crews as employees of the United States shows that in their operations general agents clearly were not authorized to exercise the rights of an owner *pro hav vice* in manning, navigating and managing the vessels assigned to them. For your further assistance there is submitted with this letter a collection of official documents referred to herein so far as they are not included in Document 4 (Plaintiff's Exhibit 7).

CONCLUSION

It is believed that the foregoing explanation conclusively establishes the purpose of the War Shipping Administration in undertaking direct operation of its vessels by masters and crews subject exclusively to its control. The purpose appears to have been threefold: First, to retain for government shipping the right to invoke sovereign immunity from foreign and local inspection, regulation

and taxation; Second, to obtain for government shipping the freedom from strikes or labor stoppages which results from preserving the status of all seamen on War Shipping Administration vessels as government employees; Third, to insure the preservation of indispensable wartime secrecy by confining all litigation which might in any way involve the navigation and physical management of government vessels to the admiralty courts where necessary security measures could be applied. It is believed that the explanation further shows beyond the possibility of doubt that operation under the general agency and berth agency agreements, as carried out by the regulations and master contracts of the War Shipping Administration, was direct government operation, differing in every essential respect from the peacetime contract operations involved in cases such as *Quinn* v. *Southgate-Nelson Co.* and *Brady* v. *Roosevelt S. S. Co.*

Respectfully.

(Sgd.) WADE H. SKINNER,
General Counsel.

APPENDIX C

War Shipping Administration Operations Regulations No. 84 (Revised)

Pertaining to all vessels owned by or under charter to the War Shipping Administration

(Dry cargo and passenger vessels)

Subject: *Definition of duties of berth agents, general agents, and agents*

Operations Regulation No. 84, dated December 29, 1943, and Supplement No. 1 thereto, dated March 22, 1944, are consolidated and amended to read:

General Order No. 21, Supplement No. 4, prescribes a revised form of service agreement for Berth Agents, which requires the Berth Agent to account directly to the Administration, instead of to the Agent or General Agent with respect to accounts that have not been rendered to the Agent or General Agent, prior to January 1, 1944. Otherwise, the outstanding regulations defining the duties of the Berth Sub-Agents, Agents and General Agents will govern with respect to services rendered, prior to January 1, 1944. Effective January 1, 1944, the duties of the Berth Agent and the Agent or General Agent will be as follows:

(1) Unless otherwise directed by the Administration, the Berth Agent shall in all cases, for the account of the Administration:

(a) Book the cargo and expedite its delivery alongside ship. Issue or cause to be issued to ship-

pers customary freight contracts, and bills of lading in the form prescribed by the Administration, and prepare manifests and other cargo documents. Where appropriate, book passengers and issue or cause to be issued to passengers customary passenger tickets in the form prescribed by the Administration. Handle mails;

(b) Collect all moneys due the United States under the Berth Agency Service Agreement and deposit, remit or disburse the same in accordance with such regulations as the Administration may prescribe from time to time, and account to the Administration for all moneys collected or disbursed by it or its Agents;

(c) While the vessel is under assignment to the Berth Agent, appoint sub-agents at foreign and intermediate ports of call for the receipt or delivery of cargo or for orders, and, subject to the provisions of paragraphs (2), (3), and (4) hereof, appoint sub-agents at domestic ports;

(d) While under his assignment arrange entrance and clearance of vessel at all foreign ports, except as provided in paragraph 6 (a), including entrance at the first port of loading and clearance from the last port of discharge.

(e) Pay agency fees, port charges, and cargo expenses in foreign and domestic ports, including fees and expenses incurred pursuant to paragraph (6) where the Berth Agent has been appointed to act in such matters as the agent of the General Agent or owner, pursuant to paragraph (6) (b);

(f) Adjust and settle cargo claims in accordance with the provisions of Wartime Insurance Instructions No. 1, as amended.

(g) Make all necessary arrangements for the transit of canals, except the Panama Canal as provided for in paragraph (5) (b).

(h) The Berth Agent shall notify the Agent or General Agent in advance of any requirements peculiar to the trade which relate to the duties of the Agent or General Agent such as arrangements for dunnage, slings, fresh water, draft, etc., affecting the projected voyage in the service of the Berth Agent.

(2) Where the Agent or General Agent does not provide its own facilities in the United States port of loading or discharge, and when not otherwise directed or approved by the Administration, the Berth Agent shall for the account of the Administration:

(a) Receive and deliver the cargo, passengers and mail; provide and pay for stevedoring and other cargo handling expenses, port charges, wharfage and dockage, pilotage, commissions, and consular charges (except those pertaining to the master, officers and crew) and all other expenses in connection with the handling of the cargo, passengers and mail.

(3) Where the Agent or General Agent provides its own facilities in the United States port of loading or discharging, and when not otherwise directed by the District Director in charge of the port where the services are performed; the Agent or General Agent shall for account of the War Shipping Administration perform the duties provided in paragraph (2) of this regulation, but the Berth Agent shall have the right to employ a Head Receiving or Delivery Clerk to supervise the operation of receiving and delivering cargo.

(4) Where the Agent or General Agent and the Berth Agent both provide their own facilities in the United States port of loading or discharge, the duties provided in paragraph (2) of this regulation shall be performed for the account of the War Shipping Administration as directed by the District Director in charge of the port where the services are performed.

(5) Except as otherwise directed by the Administration, the Agent or General Agent for account of the War Shipping Administration shall, in all cases:

(a) Order and pay for fuel, after consultation with the Berth Agent, and follow such instructions with regard thereto as shall be issued by the Administration from time to time;

(b) Make all necessary arrangements for transit of the Panama Canal.

(6) Except as otherwise directed by the Administration, the owner or General Agent shall in all cases:

(a) Appoint sub-agents to handle the vessels' business, such as repairs, restowage of cargo, matters involving General Average, etc., and where the ship calls for orders between berth agency assignments.

(b) The War Shipping Administration requests that as far as practicable all General Agents use the sub-agents of the Berth Agents at foreign ports for the handling of the vessels' business, in addition to the cargo activities performed by such sub-agents for the Berth Agent. It is also deemed desirable that the same procedure be followed with respect to time chartered vessels and it is requested that Time Charter Agents ask the owners of all vessels time chartered to the Administration to use the sub-

agents of the Berth Agents at foreign ports in similar instances and to authorize the latter to reimburse the sub-agent for expenses properly incurred for the owner's account.

(c) In every case where, in accordance with paragraph (a) hereof, the foreign sub-agent of a Berth Agent is used, the Berth Agent hereby is authorized to reimburse the foreign sub-agent out of War Shipping Administration funds for any husbanding expenses incurred for such vessel which are for account of the War Shipping Administration and when so authorized by the owner in the instance of a time chartered vessel, for account of such owner. The Berth Agent shall submit to the General Agent or to the owner of the time chartered vessel, as the case may be, the invoices and other documents covering all such husbanding expenses and shall collect from them the amounts of such expenses. In the event the General Agent, or, in the instance of a time chartered vessel, the owner has reason to question or disapprove the payment of any particular item, same shall be referred by them to the Berth Agent for adjustment with the sub-agent. This provision is stipulated because of the General Agent's and owner's over-all responsibility for the husbanding of the vessel, although it is the purpose of this regulation to permit the Berth Agent promptly to reimburse foreign sub-agents for services rendered.

(7) The Berth Agent shall promptly notify the Agent or General Agent of all known deviations or intended deviations under the terms of the bill of lading or affreightment contract. It shall be the responsibility of the Agent to immediately transmit such notification to the owner of a vessel under time

charter. Upon receipt of such information the General Agent or owner shall promptly notify the P. & I. Underwriters, pursuant to policy requirements. Such exchanges or notifications shall be made pursuant to applicable provisions of War Shipping Administration security orders and regulations.

(8) All Agents, General Agents, and owners shall attend to matters in connection with Marine casualties and resulting claims in accordance with appropriate instructions issued by the Director, Division of Wartime Insurance.

G. H. HELMBOLD,
(Sgd.) G. H. Helmbold,
Assistant Deputy Administrator
for Ship Operations.

Supreme Court of the United States

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

PAGE

The Petitioner Seeks a Review of a Question Already Determined by This Court 1

Conclusion 7

Citations

Cases:

Brady v. Roosevelt S.S. Co., 317 U. S. 575 4

Buro v. American Petroleum Trans. Corp., et al., 168 F. 2d 924 3

Caldarola v. Eckert, 332 U. S. 155 ..... 3, 4

Fink v. Shepard S.S. Co., 192 P. 2d 258 ..... 2, 6

Gaynor v. Agwilines, Inc., 76 F. Supp. 617, affirmed 1948 A. M. C. 1322 7

Hust v. Moore-McCormack Lines, 328 U. S. 707 ... 1, 2, 3, 4, 6

McGowan v. J. H. Winchester & Co., 168 F. 2d 924 .. 3

Quinn v. Southgate Nelson Corp., 121 F. 2d 190, cert. den. 314 U. S. 682 6

Shilman v. U. S., 164 F. 2d 649 ..... 6, 7

Statutes:

Jones Act (41 Stat. 1007; 46 U. S. C. 688) 1, 6

War Shipping Administration (Clarification) Act of March 24, 1943, c. 26, 57 Stat. 45, as amended (50 U. S. C. App. 1291) 2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.

COSMOPOLITAN SHIPPING COMPANY, INC.,

Petitioner,

—v.—

ROBERT A. MCALLISTER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

THE PETITIONER SEEKS A REVIEW OF A QUESTION ALREADY DETERMINED BY THIS COURT

A proper respect for the Supreme Court of the United States impelled counsel for Robert A. McAllister to advise him that he had a cause of action against the petitioner, Cosmopolitan Shipping Company, Inc., for damages pursuant to the provisions of 46 U. S. C. A. Sec. 688, commonly known as the Jones Act, and on the authority of *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, an action against the United States Government was unwarranted and unnecessary.

The same proper respect impelled the unanimous Court, opinion by Presiding Justice Hon. Augustus N. Hand, to follow the law as laid down by the Supreme Court of the United States in the case of *Hust* v. *Moore-McCormack Lines, supra,* in affirming the lower Court.

The learned Oregon Court in the case of *Fink v. Shepard S.S. Co.*, 192 P. 2d 258, rehearing denied, 193 P. 2d 537, having failed to be governed by the law as laid down by this Court in the *Hust* case, *supra*, may have given rise to cause for a writ to be issued in said case, but that is hardly justification for the issuance of one in the instant case.

It seems that the position taken at this time by the Solicitor General comes with ill grace, in view of the Government's position in the past as *amicus curiae*, with reference to the Clarification Act. The position which the Government took in the Court below is described by the Court on page 644 of the record in the following language:

> "Moreover, it is to be noted that the government in its brief as amicus curiae makes no claim that the Clarification Act has any bearing on the plaintiff's right of recovery."

The position which the Government took in the *Fink* case, *supra*, is described by the Oregon Supreme Court as follows:

> "The Government, in its brief, takes the position that the Clarification Act 'has no bearing on the present case'" (p. 421).

The weakness of the Government's position is thus demonstrated when one observes that it attempts to get to this Court by a shifting of its former position, and by misstating the facts.

For example, petitioner states on page 12 of its petition that "the agent's authority stops at the water's edge, * * *".

We desire to point out the fallacy of the Government's argument by referring to Article 14 of Defendant's Exhibit

G, which calls for the petitioner to make inspection of the vessel and arrange for the repair of its hull, machinery, equipment and so forth. Such services can hardly be rendered by stopping at the water's edge.

This Court in the *Hust* case, *supra*, did not actually decide the effect of the Clarification Act prospectively, but it did express its views in no uncertain language, at the close of the majority opinion, as follows (pp. 733, 734):

> "Congress was confessedly in a state of uncertainty. But, being so, it nevertheless had no purpose to destroy rights already accrued and in force whether substantive or remedial in character. Its object, in this respect at the least, was to preserve them and at the same time to provide an additional assured remedy in case what had been preserved might turn out for some reason to be either doubtful or lost."

The present position of the Government is contrary to the position taken by it as *amicus curiae* in the cases of *McGowan v. J. H. Winchester & Co. Inc.*, and *Buro v. American Petroleum Transport Corp., et al.*, 168 F. 2d 924, wherein the Government stated on page 29 of its brief as follows:

> "In Caldarola (Caldarola v. Eckert, 332 U. S. 155)*, the Supreme Court dispelled this confusion. The Court reaffirmed that by reason of the manner in which the agency agreement requires them to procure seamen for the United States, the general agents are 'employers' of the seamen within the technical meaning of the Jones Act so that an injured seaman can bring the

* Citation added.

statutory action against such an 'employer' (See 332 U. S. at 159)."

The judicial suggestion in the case of *Brady v. Roosevelt S.S. Co.*, 317 U. S. 575, that for Congress to effect a "substantial dilution of the rights of claimants" (p. 581), by granting immunity from suit to private operators of government owned vessels, there must be clear and unambiguous legislation, has been repeated by the United States Supreme Court in the *Hust* case, *supra*, as follows:

"We may assume that Congress could authorize so vast a disturbance to settled rights by clear and unequivocal command. It is not permissible to find one by implication. Brady v. Roosevelt S.S. Co., supra, 317 U. S. at 580" (p. 722).

The United States Supreme Court itself pointed out in the *Hust* case, *supra*, that the Clarification Act and its legislative history did not contain a "clear and unequivocal command", by stating as follows:

"The entire history will be read in vain, however, for any clear expression of intent or purpose to take away rights, substantive or remedial, of which the seaman had not already been deprived, actually or possibly, by virtue of the transfer" (p. 733).

Saving to seamen their rights and remedies under the Jones Act, against general agents of the War Shipping Administration, can have no effect one way or the other on the rights and remedies of other claimants, as pointed out in the *Caldarola* case, *supra*, wherein this Court pointed out that only for the purposes of the Jones Act is the agent considered the employer of the seaman.

It is true that the question now before the Court has been of great importance in the past, however, that is not the present situation. This Court may well take judicial notice of the fact that practically all ships formerly operated by the War Shipping Administration, are back in the hands of private operators. Congress can enact law in clear and unequivocal language if it desires to curtail the rights of seamen or if it desires to grant immunity to private ship operators engaged on behalf of the Government.

We are dealing with a man who will have to spend the rest of his life going around with the lower part of his body encased in braces; who is unable to move without the aid of crutches; who will be required to endure mental anguish, physical pain and personal embarrassment for the balance of his life; who is 28 years of age, married and the father of two children; who is dependent entirely upon a mere pittance in the form of charity by the City of New York for the existence of himself and his family; who cannot secure special medical and surgical treatment which the Government has no facilities to provide him; who has pursued his remedy in accordance with the law as laid down by this Court at the time he recommenced his action, and to whom any delay occasioned by the granting of the petition herein would impose an unwarranted further hardship.

Justice should not be delayed, nor should the thought be entertained that a seaman can be deprived of a jury trial without specific and unequivocal legislation to said effect.

In being guided by the opinion of this Court, Mr. McAllister has surrendered his right to pursue any remedy against the United States of America now being barred by the statute of limitations.

It might be in place to point out that none of the cases cited by petitioner, except the *Fink* and *Hust* cases, *supra*, deals with the rights of a seaman under the Jones Act. The common law rules of agency have no application here.

Technically, Mr. McAllister was an employee of the Government, but actually, Cosmopolitan Shipping Company, Inc., exercised as much control as any operating steamship company ever did, of its own vessels. All that is required in Federal practice is to show substantial control and not complete and exclusive control. *Quinn* v. *Southgate-Nelson Corporation*, 121 F. 2d 190, c. d. 314 U. S. 682. In any event, this question has already been disposed of in the *Hust* case, *supra*.

Petitioner failed to cite a single instance where the Government was embarrassed, or the operation of its vessels interfered with, by reason of the holding in the *Hust* case, *supra*.

The provisions of the Jones Act cannot possibly be considered as the valid basis for an action for breach of contract or for the payment of unemployment insurance taxes.

The question of interference with Government vessels in time of emergency has now become moot.

The decision by the United States Supreme Court in the *Hust* case, *supra*, should not be opened to question, merely on the basis that the Oregon Supreme Court has decided the *Fink* case, *supra*, in apparent conflict therewith.

We would like to point out one of the weaknesses in the decision in the *Fink* case, *supra*.

The decision is based in part on the opinion of Justice Augustus N. Hand in the case of *Shilman* v. *United States*, 164 F. 2d, 649. Judge Hand points out wherein the Oregon Court erred in interpreting his opinion, in the following

language in the opinion in the instant case, on page 643 of the record.

> "We stated that the Caldarola decision and that of this court in Shilman v. United States, 164 F. 2d 649, had narrowed the holding in Hust v. Moore-McCormack Lines, 328 U.S. 707, to the extent (fol. 646) that such a general agent was liable as an 'employer' only to seamen on the vessel who are injured as a result of negligence in connection with its operation."

The Court in the case of *Gaynor* v. *Aguilines, Inc.*, 76 F. Supp. 617, affirmed, 1948 A. M. C. 1322 also relied in part on the same decision in the *Shilman* case, *supra*, and totally disregarded the opinion in the *McAllister* case, *supra*.

The right of a seaman to a jury trial should not be interfered with, particularly where the seaman has surrendered all other rights in reliance on the decision by this Court, and proceeded to judgment in accordance with the law as laid down by this Court.

The petition is without merit, the question sought to be reviewed has already been decided by this Court, and accordingly, said petition should be denied.

Respectfully submitted,

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Supreme Court of the United States

BRIEF FOR RESPONDENT

INDEX

PAGE

Facts 1

The Question Before This Court 5

POINT I

The Solicitor General is endeavoring to reargue the questions heretofore resolved by this Court in the case of Hust v. Moore-McCormack Lines, Inc., 328 U. S. 707 5

POINT II

The employment status of a seaman was not changed by the Clarification Act. He was "technically" the employee of the Government before as well as after the effective date of the Clarification Act. This Court has held that a seaman did not lose his remedy against the agent by reason of a "technical" employment 8

POINT III

The remedy of a seaman to recover from the General Agent under the provisions of the Jones Act was not destroyed and taken away from the seaman by the Clarification Act. The Clarification Act deals with the method of proceeding against the Government, and not with the exclusiveness of rights and remedies 13

POINT IV

The judicial and legislative background of the Clarification Act indicates a liberal trend as exemplified by the Hust case, supra 19

PAGE

Conclusion 21

Exhibit A 23

Exhibit B 25

Citations

Cases

American Hawaiian SS Co. v. Fisher, 1948 AMC 1987 7

Brady v. Roosevelt S. S. Co., 317 U. S. 575 ..... 11, 12, 13, 14, 15, 17, 18, 19, 20

Buro v. American Petroleum Transport Corp., 168 F. (2d) 924 16

Calderola v. Eckert, 332 U. S. 155 ..... 6, 12, 19, 20, 21

Cullings v. Goetz, 256 N. Y. 287 12

Fink v. Shepard S. S. Co., 192 P. 2d. 258 16

Hust v. Moore-McCormack Lines, 328 U. S. 707 ..... 5, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21

Lustgarten v. U. S. Shipping Emergency Fleet Corp., 280 U. S. 320 19

McGowan v. J. H. Winchester & Co., 168 F. (2d) 924 16

Mulligan, Admr. v. Eastern S. S. Lines, 1948 AMC 1924 17

Quinn v. Southgate Nelson Corp., 121 F. 2d. 190 12

Warren v. U. S. A., et al., 76 F. Supp. 735 15

Statutes:

PAGE

Clarification Act, 50 U. S. C. 1291, 57 Stat. 45 ..... 5, 8, 9, 13, 15, 17, 18

Fair Labor Standards Act, 29 U. S. C. A. Sec. 203(d) 10, 11

Jones Act, 46 U. S. C. 688, 41 Stat. 1007 ..... 5, 6, 7

Labor Management Relations Act, 29 U. S. C. A. Sec. 152 (2) 10, 11

Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. 741-745 6

Miscellaneous

H. R. 483, 81st Congress, 1st Session 18, 23

H. R. 4873, 80th Congress, 2nd Session 18, 25

Operations Regulation 58 11

Public Law 213, 72nd Congress 19

IN THE

Supreme Court of the United States

October Term—1948

No. 351

ROBERT A. MCALLISTER,

Respondent,

—v.—

COSMOPOLITAN SHIPPING CO. INC.,

Petitioner.

BRIEF FOR RESPONDENT

Facts

Robert A. McAllister, respondent, is 28 years of age, married and has two children (fol. 304). He was hired by the Cosmopolitan Shipping Co., in the capacity of second assistant engineer (fols. 311-12). After having been given a physical examination (fols. 974, 1677), he boarded the SS EDWARD B. HAINES. McAllister was directly hired by Cosmopolitan Shipping Co., at that company's office, and signed articles at the line indicated without being informed and without knowing that the owner of the vessel was the United States of America, and believed and continued to believe from the start to the termination of the voyage that Cosmopolitan Shipping Co. was his sole employer (fols. 312, 313, 320, 321, 326). The other members of the crew likewise believed that Cosmo-

politan Shipping Co. Inc., was their employer (fols. 153, 267, 268, 969, 1012, 1013). (See also folios 1443 to 1445, with reference to the method of hiring engineers by Cosmopolitan Shipping Co.)

The HAINES sailed from New York City on July 24, 1945 (fol. 83) bound for the Far East. Upon arrival at Shanghai on September 26, 1945, notices were posted by the Captain which stated that there was an epidemic in the area of polio or infantile paralysis, as well as other diseases (fols. 86, 88, 278, 327, 992-3).

During the vessel's stay in the Port of Shanghai, beginning on September 26, 1945, a large number of Chinese came aboard to do stevedoring work and deck work, in addition to about 100 Chinese passengers (fols. 104, 272-4, 329, 999, 1624), of which 125 remained with the vessel on its trip to Tsing Tao (fol. 110). These included 75 persons described by appellant on page 5 of its brief to the Court of Appeals for the Second Circuit as "Chinese military truck drivers".

Everybody aboard used common toilet facilities (fols. 113, 280-283, 331, 996), common cooking utensils (fol. 114) and a common drinking fountain (fols. 282, 329). A wooden shed was constructed on the deck of the vessel, with a trough as a temporary latrine for the Chinese (fols. 110, 280, 996, 998), in the vicinity of which McAllister was compelled to work (fols 329, 330).

McAllister did not go on shore leave for over one month before he finally was sent to a hospital on December 1st (fols. 251, 586), or about 2 to 3 weeks before the vessel returned to Shanghai on November 11th (fols. 586-7). The petitioner's medical expert stated that the average incubation period of polio is 12 to 14 days (fol. 1215). McAllister began to feel ill on November 11th (fol. 594). Consequently, it follows that the polio virus was trans-

mitted to McAllister while he was aboard the vessel in the company of the aforesaid Chinese. Respondent's medical expert testified that the disease was introduced aboard the vessel while it was at Shanghai (fols. 469, 470).

On November 22nd the Chief Mate, George A. Linnartz, who was aware of the polio epidemic (fols. 126-127) notified the Master of the SS EDWARD B. HAINES that McAllister appeared to be paralyzed (fol. 125) and that he might have polio (fol. 128).

Medical attention was available from 3 different sources in close proximity to the vessel (fols. 129, 131). Nevertheless, the Master deferred medical attention for McAllister (fol. 133) until Dec. 1, 1945 (fols. 221, 1819) for the reason expressed by the Chief Mate that the Captain feared being short-handed (fol. 143). The vessel was in the Port of Shanghai all of the day, November 22nd, when notice of McAllister's serious illness was brought to the attention of the Master, and did not sail for Tsing Tao until the following day, November 23rd (fol. 579).

The medical experts established the fact that such delay in furnishing prompt, adequate and proper nursing care and medical attention resulted in weakness, loss of resistance to combat the effects of the virus, pain and suffering, permanent preventable defects consisting of paralysis, contractures and deformities (fols. 663-669, 678-681, 685, 686, 1237, 1238, 1240, 1241, 1252, 1254, 1257, 1338-1341).

One of the doctors called on behalf of McAllister, Dr. John A. DiFiore, who was Chief of Neurology at the United States Government England General Hospital during the war and in charge of the polio ward (fol. 642), stated that McAllister was suffering from:

> " * * * marked atrophy or wasting of all the muscle groups of both lower extremities, with complete paralysis, with the exception of some motion in extending

the right toes and foot. All the deep reflexes in the leg were absent.

There was partial atrophy and paralysis of the left pectoralis muscle—that is the anterior chest muscle—the left triceps and the left bicep muscles, with weakness in the function" (fols. 647, 648).

He and Dr. Samuel Frant, Deputy Commissioner of Health stated that McAllister, for practical purposes had no use of his lower extremities, required the use of braces from his waist down to his toes, required crutches to get about, and had weakness of his left upper arm (fols. 481, 482, 650).

The medical proof further established the fact that the condition was permanent, and the proof was that but for the fault of the vessel, McAllister would have recovered sufficiently to return to sea and would not have had joint stiffness or deformities (fols. 650, 651, 685, 686, 905-907).

The jury awarded a verdict of $100,000.00 in favor of McAllister on the first cause of action, based on the Jones Act. There was no recovery for maintenance, the verdict on this cause of action being returned in favor of the petitioner.

Petitioner appealed from the judgment with respect to the first cause of action, and respondent appealed from the judgment in favor of the petitioner on the second cause of action.

The Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court as to both appeals. Its opinion by Judge Augustus N. Hand, Circuit Judge, is reported at 169 F. (2) 4.

The case comes before this Court on petition for writ of certiorari granted November 22, 1948, to review the decision of the Court below.

The Question Before This Court

The question before this Court is whether the provisions of the *Clarification Act* (50 U. S. C. 1291; 57 Stat. 45) in their prospective application, limit a seaman in an action predicated on a maritime tort, while employed aboard a vessel operated by a private company under a General Agency Agreement, to an action in Admiralty against the United States of America, and deprive him of his remedy as provided by Congress in the *Jones Act* (46 U. S. C. 688; 38 Stat. 1185, 41 Stat. 1007).

POINT I

The Solicitor General is endeavoring to reargue the questions heretofore resolved by this Court in the case of *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U. S. 707.

The *Hust* case, *supra,* under the doctrine of stare decisis is determinative of all the issues in the present case, except the question of the effect of the Clarification Act during its prospective period of operation.

Learned counsel for the Government has gone to great length in his endeavor to have this Court reverse itself.

There are no changed circumstances pointed out by petitioner in support of its attempt to reargue the questions decided in the *Hust* case, *supra.*

As a matter of fact, the very reasons which prompted the dissent in the *Hust* case, *supra,* no longer exist. Petitioner itself concedes as follows on page 36 of its brief, footnote 13, that the Jones Act refers only to:

> " * * * 'any seaman who shall suffer personal injury in the course of his employment' (46 U. S. C. 688) and by

its terms does not seem to require a common-law-employer-employee relationship."

The Clarification Act restricted a seaman's remedy when directed against the United States of America for torts committed on either merchant or public vessels, to the Suits in Admiralty Act, 41 Stat. 525; 46 U. S. C. 741-745, but did not in anywise make such remedy exclusive or modify or abridge a seaman's remedy enforceable against a General Agent under the Jones Act.

Petitioner urges that national and international interests of the United States affecting the immunity of Government vessels in foreign ports, as well as immunity from regulations and taxation by local Governments might be raised were the agent held subject to liability for damages by a seaman injured on a vessel operated by it under the aforesaid agency agreement.

It is respectfully submitted that the mere fact that the agent is held liable to a seaman under the Jones Act does not in and of itself determine all the multifarious aspects of operation and control of War Shipping Administration vessels. The United States Government is for purposes of international law, as well as for purposes of State legislation, deemed the owner in control of War Shipping Administration vessels. It is a perfectly familiar legal situation that for purposes of the Jones Act, the General Agent may be held liable for maritime torts occurring aboard vessels under a General Agency Agreement, while for other purposes the Government is held to be the owner in control.

Mr. Justice Frankfurter in the case of *Caldarola* v. *Eckert*, 332 U. S. 155 stated on page 159 that:

"The Court did not hold that the Agency contract made the Agent for all practical purposes the owner of the vessel."

distinguishing the case of a seaman suing a General Agent under the Jones Act.

All contentions of the petitioner with respect to alleged disadvantages that would accrue in the absence of *in camera* admiralty proceedings were known to Congress prior to the passage of the Clarification Act, and that body in its wisdom decided after weighing the advantages and disadvantages involved not to foreclose seamen from their right to a trial by jury against the General Agent under the Jones Act. Congress, by statute, has the power, if it so desires, to exclude various documents and information from use as evidence in courts of law. Petitioner failed to cite a single instance where the Government was in fact caused to sustain financial loss, or suffer seizure of Government owned vessels in foreign ports, or subjected to embarrassment by disclosure of secret and confidential documents by reason of the holding in the *Hust* case, *supra*.

The question of interference with Government vessels in time of emergency has now become moot.

The issue of the right of a state to withhold tax from seamen's wages has been decided against the state in the case of *American Hawaiian Steamship Co.* v. *Fisher, as Commissioner and Chairman of the Oregon State Tax Commission*, not officially reported, unofficially reported in 1948 American Maritime Cases 1987 (November 1948). There being no liability of steamship companies for withholding taxes, there can be no claims for reimbursement to said companies by the Government.

POINT II

The employment status of a seaman was not change by the Clarification Act. He was "technically" th employee of the Government before as well as afte the effective date of the Clarification Act. This Cou has held that a seaman did not lose his remedy agains the agent by reason of a "technical" employment.

Respondent concedes that he was the employee of th United States, during the periods of retrospective and pr spective operation of the Clarification Act. The Clarifica tion Act does not alter the employment status of the sea man or the employment relationship between the seama and the Government.

The majority of this Court in the *Hust* case, *supra,* hel that a seaman had the right to maintain a Jones Act caus of action against the General Agent. Mr. Justice Ree in his dissenting opinion, concurred in by Mr. Justic Frankfurter and Mr. Justice Burton, while denying th existence of a Jones Act remedy against the General Agen affirmatively stated that the Clarification Act had no bear ing on the existing rights and remedies against said Genera Agent.

The holding of the *Hust* case, *supra,* is equally applicabl to both the aforementioned periods. In the *Hust* case *supra,* the Court stated on page 724 as follows:

> "But it does not follow from the fact that Hust was tech nically the Government's employee that he lost al remedies against the operating 'agent' for such injuries as he incurred."

The petitioner argues again as it did in the *Hust* case, *supra*, that the nature of the General Agent's authority is such that in private litigation it would not have liability for torts committed aboard War Shipping Administration vessels. Nothing in the Clarification Act modifies the laws of agency, as interpreted in the *Hust* case, *supra*, where on pages 724, 725 the following appears:

> "Here indeed is the respondent's fallacy, for it assumes the case would be controlled by the common law rules of private agency. It is true these are applied in the normal everyday applications of the Jones Act. But in those situations this is done to determine who comes within, who without the covered class in the Act's normal operation, not to exclude that class entirely or in large part. Here the application is made to defeat the Act for all except the smaller number of men whom it was enacted to protect. No such application of the common-law 'control' test can be justified in this temporary situation unless by inversion of that wisdom which teaches that 'the letter killeth, but the spirit giveth life.'"

McAllister's rights are not governed by the common-law rules of private agency. Nothing in the Clarification Act imposes an obligation on him to establish his cause of action pursuant to common-law rules of agency. He had an identical burden of proof as did Hust in the *Hust* case, *supra*. For the purposes of the Jones Act, McAllister is considered as having all the rights and remedies of a seaman against the Cosmopolitan Shipping Co. Inc., irrespective of the fact that he is a "technical" employee of the United States of America. In administering rights and remedies under Federal Acts, entities which are in fact not employers, may

for the purposes of the Act be regarded as employers. The "in fact" relationship between McAllister and the Cosmopolitan Shipping Co. Inc., has been recognized in the right of merchant seamen on War Shipping Administration vessels to "invoke the dispute jurisdiction of the National War Labor Board as fully as if employed on privately operated vessels" (p. 74, petitioner's brief).

The War Labor Board in its Directive Order of August 31, 1945, *In re Maritime Cases*, 26 War Lab. Rep. 509, 512, set forth in footnote 36 of petitioner's brief, states as follows:

> "The question raised as to whether the operators should be named in the contract as employers, or, as in the last contract, as general agents for the War Shipping Administration, has no real significance. Whatever the designation in the contract, the operators are the employers for the purpose of this dispute, as contemplated by the War Labor Disputes Act."

The footnote sets forth further that Section 2 of the National Labor Relations Act, followed by the War Labor Disputes Act, defines an employer as "any person acting in the interest of an employer, directly or indirectly".

In the Labor Management Relations Act, 1947, as amended, commonly known as the Taft-Hartley Act, 29 U. S. C. A. Sec. 152 (2), is found the following definition of "employer":

> "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly * * *."

Similarly, in the Fair Labor Standards Act of 1938, commonly known as the Wagner Act, 29 U. S. C. A. Sec. 203 (d), is found the following definition of "employer":

"'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *"

Petitioner admits in the footnote on page 75 of its brief that Congress prior to the passage of the Clarification Act "specifically examined and approved" the definitions of "employer" as found in the National Labor Relations Act and the War Labor Disputes Act.

Nowhere in petitioner's brief can be found any factual distinction between the functions of agents under the so-called Roosevelt form of agreement of the *Brady* v. *Roosevelt Shipping Corporation* case, 317 U. S. 575, and the GAA 4-4-42 form of agreement of the *Hust* case, *supra*. The distinction lies only in the phraseology of the agreements themselves, by and between the Government and the General Agent, obviously not changing the relationship between the General Agent and non-signatory merchant seamen.

In many respects the Operations Regulations set forth on page 86 *et seq.* of petitioner's brief, conclusively show that the General Agent's functions did not stop at the water's edge. For example, Regulation No. 58, page 93 of petitioner's brief, "concerns the status of military and naval personnel assigned aboard merchant vessels and directs the general agents to *instruct* the masters in connection with and to comply therewith".

The facts in the case at bar show that about seventy-five Chinese *military* truck drivers had been taken aboard the vessel. The presence of carriers from an infected area was determined as a proximate cause of McAllister's disability. Regulation No. 58 directly imposes the responsibility on the General Agent for the conduct of the Master with reference to the presence of the military personnel. The peti-

tioner is liable for its breach of duty, as provided by Regulation 58, in failing to instruct the Master as to his conduct with relation to military personnel, which violation by the petitioner was a proximate or contributing cause of McAllister's illness.

Thus, petitioner is liable not only under the decision as laid down by the majority of this Court in the *Hust* case, *supra*, but is likewise liable under the principle advanced by the minority that an action could be maintained against an agent at common-law for the agent's own torts, on the authority of the *Brady* case, *supra*.

In the light of the provisions of GAA 4-4-42 for reimbursement to General Agents for disbursements for and on account of *damages or compensation for death or personal injury or illness* (Exhibit G, Art. 7, fol. 1842, p. 81 of petitioner's brief), indemnification of General Agents for *damages for personal injury or loss of life* (Exhibit G, Art. 16, fol. 1859, p. 83 of petitioner's brief), insurance coverage of General Agents at Government expense *against all insurable risks, including marine, war and protection and indemnity risks* (Exhibit G, Art. 8, fols. 1846, 1847, p. 158 of petitioner's brief), the logical conclusion, as held by this Court, is that the General Agent is liable to a seaman under the Jones Act.

Technically, McAllister was an employee of the Government, but actually, Cosmopolitan Shipping Company, Inc., exercised as much control as any operating steamship company of its own vessels during the war emergency period. Moreover, all that is required in Federal practice is substantial control, *Quinn* v. *Southgate Nelson Corporation*, 121 F. (2d) 190, c. d. 314 U. S. 682, as distinguished from N. Y. State law which requires complete and exclusive control. *Cullings* v. *Goetz*, 256 N. Y. 287; *Caldarola* v. *Eckert*, 332 U. S. 155.

POINT III

The remedy of a seaman to recover from the General Agent under the provisions of the Jones Act was not destroyed and taken away from the seaman by the Clarification Act. The Clarification Act deals with the method of proceeding against the Government, and not with the exclusiveness of rights and remedies.

The purpose of the Clarification Act was the "clarification" of the rights and remedies of a seaman against the United States Government, and did not at all touch upon the rights and remedies of a seaman against a General Agent. The Clarification Act did not change the existing law as interpreted by the United States Supreme Court in the *Hust* case, *supra,* in which respect the dissenting opinion concurred.

The remedy of a seaman to recover from the General Agent under the provisions of the Jones Act was not destroyed and taken from the seaman by the Clarification Act. To do so Congress was required to use clear and unequivocal language as pointed out by the United States Supreme Court in the *Brady* case, *supra.*

Immunity cannot be asserted by the General Agent as a bar to seamen's rights and remedies under the Jones Act without specific Congressional enactment. Reference to the retrospective period from October 1, 1941 to the date of the enactment of the Clarification Act, March 24, 1943, was exclusively addressed to furnishing a measure of protection to seamen, at least as against the Government, without reference to any other remedies against other entities. This was necessitated by the uncertainty created by the unique status of seamen, as a result of the war emergency.

The judicial suggestion in the *Brady* case, *supra*, that for Congress to effect a "substantial dilution of the rights of claimants" (p. 581), by granting immunity from suit to private operators of government owned vessels, there must be clear and unambiguous legislation, has been repeated by the United States Supreme Court in the *Hust* case, *supra*, as follows:

> "We may assume that Congress could authorize so vast a disturbance to settled rights by clear and unequivocal command. It is not permissible to find one by implication. Brady v. Roosevelt S.S. Co., supra, 317 U. S. at 580" (p. 722).

This Court pointed out in the *Hust* case, *supra*, that the Clarification Act and its legislative history did not contain a "clear and unequivocal command", by stating as follows:

> "It can be said, however, with assurance that, taken as a whole, the committee reports in Congress, together with appended documents from various affected agencies and officials, are amorphous in relation to the crucial problem presented in this case. All of them give evidence of concern that rights may have been lost or rendered uncertain by the transfer, and that action should be taken by congress to preserve the substantive rights intact and remedial ones at the least by extension of the Suits in Admiralty Act to cover them."
>
> "The entire history will be read in vain, however, for any clear expression of intent or purpose to take away rights, substantive or remedial, of which the seaman had not already been deprived, actually or possibly, by virtue of the transfer" (p. 733).

It is clear from the Congressional Committee Reports that the *Brady* case, *supra*, was known to Congress, and its holding carefully considered at the time of the passage of the Clarification Act. Had Congress intended to grant immunity to General Agents it would have done so in clear and unambiguous language.

It is apparent from Committee Reports that Congress recognized the possibility that General Agents would be held to have an independent liability for torts. Instead of granting immunity from suit to the General Agents, Congress was scrupulously careful to so amend the existing law as to provide for indemnification for General Agents in the event of a decision just such as the *Hust* case, *supra*. This legislation obviously does not meet the test of disturbing existing rights and remedies only by "clear and unequivocal command."

One of the most recent decisions in the lower Courts was by Hon. Harold R. Medina, in the case of *Warren* v. *United States of America, et al.*, 76 F. Supp. 735, 736, memorandum on motion for rehearing dated March 4, 1948, wherein he stated:

> "Respondent American South African Line Inc. now urges for the first time that the Clarification Act is a bar to libellant's recovery. But by the weight of authority and the weight of reason too the Clarification Act will not bear the construction which respondent would give it with respect to rights arising after the date it took effect."

Heretofore, the Government has consistently conceded that the Clarification Act in nowise affected the right and remedy of a seaman to maintain an action for a maritime tort against a General Agent. The Government, as *Amicus*

Curiae in the case of *Fink* v. *Shepard Steamship Company*, 192 P. (2d) 258, took the position which is described by the Oregon Supreme Court in the following language:

> "The Government, in its brief, takes the position that the Clarification Act 'has no bearing on the present case'" (p. 270).

Again as *Amicus Curiae* in the cases of *McGowan* v. *J. H. Winchester & Co. Inc.*, and *Buro* v. *American Petroleum Transport Corp., et al.*, 168 F. (2d) 924, on page 29 of its brief, the Government referring to the agent being considered owner *pro hac vice*, stated as follows:

> "In Caldarola (*Caldarola* v. *Eckert*, 332 U. S. 155),* the Supreme Court dispelled this confusion. The Court reaffirmed that by reason of the manner in which the agency agreement requires them to procure seamen for the United States, the general agents are 'employers' of the seamen within the technical meaning of the Jones Act so that an injured seaman can bring the statutory action against such an 'employer' (See 332 U. S. at 159)."

Nowhere in the previous briefs of the Government is there any comment that the Clarification Act changed the law as interpreted by the United States Supreme Court in the *Hust* case, *supra*.

The Government's position in the instant case before the Court below is set forth in its opinion as follows:

> "Moreover, it is to be noted that the Government in its brief as amicus curiae makes no claim that the Clarifi-

* Words in parentheses added.

cation Act has any bearing on the plaintiff's right of recovery" (p. 8).

No reference is made in the Clarification Act to liabilities of General Agents and nothing is said as to the rights and remedies of seamen against such General Agents. Such omission is of the utmost significance as is pointed out by this Court in the *Brady* case, *supra*, pages 580, 581 as follows:

> "We may also assume that it (Congress) would have the power to grant immunity to private operators of government vessels for their torts. But such a basic change in one of the fundamentals of the law of agency should hardly be left to conjecture."

This Court in the *Hust* case, *supra*, did not actually decide the effect of the Clarification Act prospectively, but it did express its views in no uncertain language at the close of the majority opinion, as follows (pp. 733, 734):

> "Congress was confessedly in a state of uncertainty. But, being so, it nevertheless had no purpose to destroy rights already accrued and in force, whether substantive or remedial in character. Its object, in this respect at the least, was to preserve them and at the same time to provide an additional assured remedy in case what had been preserved might turn out for some reason to be either doubtful or lost."

Judges Learned Hand, Thomas W. Swan and Harrie B. Chase, Circuit Judges for the Court of Appeals, Second Circuit have followed the decision in the instant case in the case of *Francis J. Mulligan, Public Administrator (James Brodie Hutchison, deceased)* v. *Eastern Steamship Lines,*

Inc., not officially reported, unofficially reported 1948 American Maritime Cases 1924 (November 30, 1948).

There is no doubt that Congress fully appreciated the purport of the *Brady* decision to the effect that clear and unequivocal language must be used to abridge or limit a seaman's right or remedy.

H. R. 483, 81st Congress, 1st Session, annexed hereto as Exhibit A, and H. R. 4873, 80th Congress, 2nd Session, annexed hereto as Exhibit B, express under Section 5 thereof, *as contrasted with the language of the Clarification Act*, an intent by clear and unequivocal command to make the remedy exclusive under the Suits in Admiralty Act. Said language is as follows:

> "Sec. 5 * * * That where a remedy is provided by this Act it shall *hereafter be exclusive* of any other action by reason of the same subject matter against the agent or employee of the United States * * * " (Italics ours.)

Any action that may be predicated on the above proposed statute may hereafter be maintained only against the United States of America.

The Clarification Act provided the method whereby a seaman injured on either a merchant or a public vessel could enforce his remedy against the United States of America, to wit, by an action under the Suits in Admiralty Act. Congress did limit the method of obtaining redress against the United States of America, but nowhere in the language of the Act or in the debates of Congress preceding the enactment of the Clarification Act is there to be found an intention to curtail, limit or even define either the rights or remedies that a seaman had or would continue to have against a private operator acting as a General Agent.

POINT IV

The judicial and legislative background of the Clarification Act indicates a liberal trend as exemplified by the *Hust* case, *supra*.

Petitioner seeks to resurrect the law declared in the case of *Lustgarten* v. *United States Shipping Emergency Fleet Corp., et al.*, 280 U. S. 320, which has been specifically reversed by this Court in the *Brady* case, *supra*.

In the *Lustgarten* case, *supra*, decided in 1930, this Court held that the Suits in Admiralty Act precluded suits against the Fleet Corporation and its agents for their maritime torts arising out of the operation of merchant vessels.

The decision deprived relief to many claimants who had theretofore sued the corporation or its agents in reliance upon the prevailing theory as to the law, and whose rights to bring suit against the Government after the date of the decision had expired. As a result, Congress enacted Public Law 213 of the 72nd Congress, which revived for such claimants their rights to institute suits against the Government within a stated time. The statute referred to, however, did not legislatively settle the question of the exclusiveness of the remedy.

In 1942, in the *Brady* case, *supra*, this Court held that the Suits in Admiralty Act, by furnishing an *in personam* remedy against the United States, did not free the agent from liability for his own torts. The Court held that the Suits in Admiralty Act did not provide the exclusive remedy for maritime torts arising out of the operation of merchant vessels by agents of the Government.

This Court in the *Caldarola* case, *supra*, although at variance as to other features, unanimously concurred in

and approved the principle established in the *Brady* case, *supra*, that the Suits in Admiralty Act was not the exclusive remedy in actions for maritime torts arising on vessels operated by Government agents.

The holding of the *Brady* case, *supra*, viewed as a holding that the agent was suable, without reaching "the different question" whether "a cause of action" against the agent had been established, was expanded in the *Hust* case, *supra*, which holds not only that the agent is suable and that the Suits in Admiralty Act is not an exclusive remedy, but further holds that the General Agent is liable for maritime torts notwithstanding the fact that the General Agent is not the technical employer of the seaman, and notwithstanding the fact that the General Agent would not be liable under the common-law rules of private agency.

Mr. Justice Frankfurter in the *Caldarola* case, *supra*, stated: "it (referring to the *Brady* case)* merely held that the Suits in Admiralty Act, by furnishing an in personam remedy against the United States, did not free the Agent from liability for his own torts. The Brady case did not reach the 'different question' whether 'a cause of action' against the Agent had been established" (p. 160).

This Court in the *Caldarola* case, *supra*, recognized that a General Agent was suable for its own torts. In the *Hust* case, *supra*, this Court reached the "different question" insofar as a seaman was concerned, and held that the General Agent was liable under the Jones Act irrespective of the fact that the General Agent was not the "technical" employer of the seaman, and irrespective of the fact that the General Agent would not be liable under the common law rules of private agency. The entire Court in the *Caldarola* case, *supra*, reaffirmed this holding of the *Hust* case, *supra*, although considering a different question.

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* Words in parentheses added.

CONCLUSION

Petitioner has failed to present any basis in law or in fact why the principle laid down by this Court in the *Hust* case, *supra*, and reaffirmed in the *Caldarola* case, *supra*, should be reversed. Indeed, the passage of time has rendered moot the considerations which are urged as the basis for such reversal. Questions of sovereign immunity and national interest with reference to the operation by General Agents of Government owned vessels are matters for Congressional consideration. The Solicitor General, representing the Executive branch of the Government, seeks to have the Judiciary perform a function which would seem to be within the province of Congress. This Court should not be asked to give a forced intent to an Act of Congress in the absence of a "clear and unequivocal command."

The very fact that there is so much difference of opinion as to Congressional intent in the passage of the Clarification Act should impel this Court to continue with its expressed liberal view in treating with the rights of seamen.

(In reliance on this Court's decision in the *Hust* case, *supra*, McAllister did not file a claim against the Government and is now time-barred from proceeding in Admiralty against the United States of America.)

Respectfully submitted,

BERTRAM J. DEMBO,
Attorney for Respondent.

JACOB RASSNER,
Of Counsel.

JACK STEINMAN,
ROBERT KLONSKY,
On Brief.

Exhibit A

81ST CONGRESS
1ST SESSION

H. R. 483

IN THE HOUSE OF REPRESENTATIVES

JANUARY 3, 1949

Mr. LANE introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To extend the time limit within which certain suits in admiralty may be brought against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 5 of the Suits in Admiralty Act (41 Stat. 525, 46 U. S. C. 741-745), approved March 9, 1920, is amended to read as follows:

"SEC. 5. That suits as herein authorized may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this Act it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further,* That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States

brought hereunder within one year after the enactment of this amendatory Act if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel: *And provided further,* That after June 30, 1932, no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by section 2 of this Act unless upon a contract expressly stipulating for the payment of interest."

Exhibit B

80TH CONGRESS
2D SESSION

H. R. 4873

IN THE SENATE OF THE UNITED STATES

JUNE 9 (legislative day, JUNE 1), 1948

Read twice and referred to the Committee on the Judiciary

AN ACT

To extend the time limit within which certain suits in admiralty may be brought against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 5 of the Suits in Admiralty Act (41 Stat. 525, 46 U. S. C. 741-745), approved March 9, 1920, is amended to read as follows:

"SEC. 5. That suits as herein authorized may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this Act it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further,* That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States

brought hereunder within one year after the enactment of this amendatory Act if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel owned or bareboat chartered by the United States or against the master of any such vessel: *And provided further,* That after June 30, 1932, no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by section 2 of this Act unless upon a contract expressly stipulating for the payment of interest."

Passed the House of Representatives June 8, 1948.

Attest:

JOHN ANDREWS,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

ROBERT McALLISTER,

Plaintiff-respondent below,

against

COSMOPOLITAN SHIPPING COMPANY, INC.,

Petitioner-appellant below.

BRIEF OF FRIENDS OF ANDREW FURUSETH LEGISLATIVE ASSOCIATION, *Amicus Curiae*

INDEX

PAGE

PRELIMINARY STATEMENT 1

POINT I—Public Law 17, 57 Stat. 45, 50 U. S. C. A. App. Section 1291, shows a continuing intent to permit a seaman at his election, to sue his employer, the operator of the steamship, at law, and have a jury determine the facts and assess damages if any 2

SEAMAN'S ACT, MARCH 4th, 1915, Section 20 2

Railway Act, Section 8657 4

Courts Open to Seamen, Act 612, 40 Stat. 157 5

Judicial Code 1789, Title 28, U. S. C. A., Sec. 41 7

Clarification Act, Chap. 26, 57 Stat. 47, Sec. 1291 7

TABLE OF CASES

Abdu, Ex Parte, 247 U. S. 27 5

Berg v. Philadelphia & Reading, 266 Fed. 593 (Third Cir.), affirmed 274 Fed. 534 3

Brady v. Roosevelt, 317 U. S. 575 6

Chelentis v. Luckenbach, 247 U. S. 372 2

Cortes v. Bull, 237 U. S. 367 5

Dillon v. Strathearn, 252 U. S. 348 3

Johnson v. Lustgarten, 280 U. S. 320 6

Kryakos v. Goulandris, 151 Fed. (2) 132 10

Mulligan v. Eastern Steamship Lines, Inc., 170 F. (2) 882 10

Osceola, 189 U. S, 158 2

Panama v. Johnson, 264 U. S. 375 (P. 389) 3-4

Quebec v. Merchant, 133 U. S. 375 (1890) 2

Reed v. Canfield, 20 Fed. cases 426 (Case 11641) 5

Sonneson v. Panama Transport, 298 N. Y. 262 10

Southern Pacific v. Jansen, 244 U. S. 205 11

Workman v. New York City, 179 U. S. 552, p. 558 11

In the

Supreme Court of the United States

October Term 1948

Robert McAllister,

Respondent,

against

Cosmopolitan Shipping Company, Inc.,

Petitioner.

BRIEF OF FRIENDS OF ANDREW FURUSETH LEGISLATIVE ASSOCIATION, *Amicus Curiae*

Preliminary Statement

The question presented to this Court is whether a seaman, who was employed on a ship, operated under the standard form of a General Agency Agreement between the United States War Shipping Administration and a privately owned Steamship Company, who was injured or became ill while so employed at a date subsequent to the effective date of the Clarification Act, has a cause of action, which he may pursue in a State or Federal Court at law, under the Jones Act against said Steamship Company.

The exact question which directly affects the rights of the respondent is—*whether a seaman or his representative may sue the General Agent under the Jones Act, and have a trial by jury.*

POINT I.

Public Law 17, 57 Stat. 45, 50, U. S. C. A. App. Section 1291, shows a continuing intent to permit a seaman at his election, to sue his employer, the operator of the steamship, at law, and have a jury determine the facts and assess damages if any.

The Jones Act was an amendment of Section 20 of the LaFollette Seamen's Act of March 4th, 1915, which read as follows:

> "Sec. 20. In any suit to recover damages for any injury, sustained on board vessel or in its service, seamen having command shall not be held to be fellow-servants with those under their authority."

In drawing the Bill in just that way, we relied upon the statement in paragraph numbered "3", page 175 of *the Osceola,* 189 U. S. 158, in which the Supreme Court stated (1903):

> "All members of the crew * * * are as between themselves, fellow-servants, and hence, seamen, cannot recover for injuries sustained through the negligence of another member of the crew * * *."

In 1918, when we filed a petition for certiorari, briefed and argued the *Chelentis* case, 247 U. S. 372, having relied upon the decision in *Quebec* v. *Merchant,* 133 U. S. 375 (1890), and the restatement in *The Osceola, supra.* We had fallen into the erroneous belief that the basis of liability of an employer at Common Law, had somehow or other been engrafted to effect liability under the Maritime Law.

A careful study of those cases and subsequent ones, indicates of course, that the shipowner never did owe any duty to the seaman (as Justice McReynolds stated in the

Chelentis case) except to furnish a seaworthy vessel and maintain the ship and her appliances in a seaworthy condition. The basis of this obligation of course, was contractual.

While we often, in pleadings and on motions, and in trials, referred to the common-law duty to furnish a reasonably safe place in which to work, strictly speaking, the shipowner had only a duty to give care and maintenance and to furnish a seaworthy vessel.

One of the reasons that Congress passed the LaFollette Seamen's Act was that they believed it would, by releasing the wages of seamen of foreign vessels, bring about *an equalization* of operating costs. Indeed it is estimated that foreign seamen did receive about three billion dollars a year in increased wages for the next fifteen years or so, after the Half-wage Law finally went into effect. *Dillon* v. *Strathearne*, 252 U. S. 348.

After the decision, adverse in the Chelentis case, from the seamen's point of view, and while passage of the Jones Act amendment was being urged, there was raised by able counsel for the shipowner in the case of *Berg* v. *Philadelphia and Reading Railway*, 266 Fed. 593 (Third Circuit, affirmed—274 Fed. 534), the *question* of whether or not there *had really been saved* to the seamen, in the creation of the admiralty jurisdiction under the Judiciary Act, Title 28, U. S. C. A.—Sec. 41, *the right to have a trial by jury.*

We *did* prevail upon Senator Wesley Jones then Chairman of the Committee on Commerce (U. S. Senate) to insert in the Jones Act, the following provision:

> "at his election maintain an action for damages at law, with the right of trial by jury."

This Court, in *Panama* v. *Johnson*, 264 U. S. 375, upheld the constitutionality of the Jones Act, on the ground that—

"the Congress is empowered by the constitutional provision, to alter, qualify or supplement the maritime rules * * * in relative conformity to the common rules or some modification of the latter, if the change be countrywide and uniform in operation."

And on page 389 of 264 U. S. 375, *Panama* v. *Johnson*, this court, stated:

"As originally enacted, Sec. 20 was part of an act, the declared purpose of which was 'to promote the welfare of American seamen.' It then provided that in suits to recover damages for personal injuries, 'seamen having command shall not be held to be fellow-servants with those under their authority', and in Chelentis v. Luckenbach S. S. Co., supra, page 384, this Court treated it as part of the Maritime Law, but held, it did not disclose a purpose 'to impose upon shipowners the same measure of liability for injuries suffered by the crew while at sea, as the common law prescribed for employers in respect of their employees on shore.'"

The Jones Act has been enforced in both State and Federal Courts ever since. The amendment to the *Railway Servants Act*, Sec. 8657, extending from two to three years the time in which suit can be brought in cases of personal injury or death, has permitted seamen who have been damaged by negligence in the navigation of vessels, to undertake negotiations to settle their claims for a period of more than two years, and then to bring suit if necessary, before the limitation on the cause of action expired.

This brief is filed on behalf of one such widow Mrs. Catherine M. Matthews, whose husband died as a result of exposure to sea-water in a Neptune Trial (equator crossing) which took place immediately after he left the en-

gine room where he had been caused to perspire freely in the performance of his work as chief engineer. He contracted a severe cold and pneumonia, and died without proper treatment six days later, November 28th, 1944, although the vessel was in convoy, and a skilled physician on a Cruiser in this convoy was available, and could have attended to him had the master, mate, or pharmacist's mate exercised that degree of care which was owed.

In 1932, this Court in *Cortes* v. *Bull*, 237 U. S. 367, in a learned opinion written by the late Justice Cardozo, held that a cause of action for neglect to treat, although arising under the ancient maritime law (*Rules of Oleron*, 30 Fed. cases; *Reed* v. *Canfield*, 20 Fed. cases 426—Case 11641), could be prosecuted at Common Law under the provisions of the Jones Act.

With the coming of the Second World War, Congress took action, as it had, prior to the First World War, to set up an agency, so that it would be possible to have operated for us, merchant vessels which were indispensable to the maintenance of our armed forces to move troops, and supply our allies and soldiers with needed food, and munitions.

All during the First World War, and up to 1928, merchant seamen were permitted to enforce their claims in the State or Federal Courts of this whole country, at common-law or in admiralty as they chose.

Congress had provided in the Seamen's Act that the courts of the United States should be opened to seamen without the prepayment of fees. This Court in *Ex Parte Abdu*, 247 U. S. 27, May 20th, 1918, held that the Act of June 12th, 1917, Chapter 27, 40 Stat. 157, intended by Congress to permit seamen to have free use of the courts without the prepayment of fees, did not include proceedings before the Appellate Courts. Congress acted almost immediately and amended the statute so as to include Appellate Courts.

Things for the seaman ran along very smoothly until January 6th, 1930. The lawyers for the government and the Emergency Fleet Corporation had permitted seamen to sue at common-law and recover substantial verdicts since the United States Emergency Fleet Corporation was incorporated 1915. But the United States Government prevailed upon the Supreme Court in *Johnson-Lustgarten*, 280 U. S. 320, to hold that the seamen's sole remedy under the Jones Act, the vessel being owned by the United States and operated by the Fleet Corporation, was a suit under the Suits in Admiralty Act. Thus they deprived the seaman of a trial by jury in case of accident aboard vessels operated by a government Agency.

In 1943 this Court in *Brady* v. *Roosevelt*, 317 U. S. 575, reversed the Lustgarten case and again permitted merchant seamen to maintain their actions at common-law with jury trials.

In March 1943, as a result of hearings on Bill H. R. 7424 in the House of Representatives, and another bill before the Committee on Commerce in the U. S. Senate, there was a compromise between the Committee of the House and Senate, of which the Clarification Act is the result.

Seamen were opposed to passage of any Compensation Act, which would be an exclusive remedy, and had consistently maintained through their representatives, that they should be permitted to sue at common-law or in admiralty for injuries sustained by them in the performance of their work, on any merchant vessels anywhere.

Seamen and their representatives, when the Clarification Act was passed, understood that the rights of seamen to have jury trials as stated in the Jones Act, were preserved.

Justice Sutherland (then ex-Senator) had insisted in 1920 that the language about a jury trial in the Jones Act

was unnecessary because of the terms of the "saving to suitors" clause of the Judiciary Act discussed in *Panama* v. *Johnson* (1924), at page 390 of U. S. Reports, Volume 264. Justice Sutherland did not sit in the *Panama* v. *Johnson* case, since he had been an adviser to the seamen on the wording of the Jones Act.

Nevertheless we insisted that in view of the argument in the *Berg* case, *supra*, we wanted *the right of a seaman to trial by jury* reaffirmed.

The Judicial Code of 1789, as restated in Title 28, U. S. C. A., Sec. 41, says that:

> "The District Courts shall have original jurisdiction as follows: (3) *Admiralty causes, seizures and Prizes.* Third—of all Civil Causes of Admiralty and Maritime Jurisdiction, saving to suitors in all cases the right of a common-law remedy, where the common-law is competent to give it",

Above "Saving to Suitors" clause now reads in Title 28 U. S. C. Dec. 1933, effective Sept. 1, 1948, as follows:

> "The District Court shall have jurisdiction, exclusive of the states, of (1) *Any Civil Case of Admiralty or Maritime Jurisdiction saving to the libellant or Petitioner in every case any other remedy to which he is otherwise entitled.*"

The Jones Act has been construed by this Court to be a part of the General Martime Law of the United States—*Panama* v. *Johnson*, 264 U. S. 375, and the *Clarification Act of March 24th, 1943*, Chapter 26, 57 Stat. 47, Sec. 1291, was passed, continuing the provision:

> "Claims arising under Clause 1 hereof, shall be enforced in the same manner as such claims would be

enforced if the seaman were employed in a privately owned American vessel."

At any rate, Mr. Elmer H. Groefsma, 2343 Buhl Building, Detroit, Michigan (attorney for Mrs. Matthews), had read as had many others, the decision of this Court of June 10th, 1946 in the Hust case. After scanning the Clarification Act he decided that he had three years in which to sue, if suit became necessary. The date of death of Mr. Matthews was November 28th, 1944, and suit was started June 18th, 1947.

This Court in reaching a decision in the Hust case, took into consideration the fact that seamen of the United States, had for years been engaged in collective bargaining with Companies and shipowners on the Pacific Coast, on the Atlantic Coast and Gulf and on the Great Lakes. These contracts had been renewed from time to time. The United States declared war on December 8th, 1941, and the United States Government, through the Maritime Commission, took control of our whole merchant fleet in order to direct the movements of our vessels. This action was necessary to win the war, we say it did not deprive the merchant seamen of their rights to pursue their remedies at law or in admiralty.

Merchant seamen were not conscripted. They continued as free citizens. They were not enlisted in civil service. They were not made the beneficiaries of any pensions. They were left as free citizens, and it was of course, provided that citizens employed in the Merchant Marine would not be subject to the draft.

The Clarification Act as we understood it at the time of its preparation and passage, was intended to provide that the seamen should continue to have all their then existing remedies.

It is true that the government of the United States through one of its departments, set up an elaborate system of contracts for the proper operation and control of its merchant vessels. It provided that the operator must set up a special fund, out of which his disbursements for the operation of vessels under his control must be paid. Art. 7—Last Paragraph.

Since the adoption of our Constitution, and prior thereto, it has been the practice for the master, as alter ego of the owner, to engage the seamen in agreements for voyages, under Articles of Agreement which more or less described the voyage to be undertaken.

While general rules were created for the control of all agents of the United States who were authorized to operate steam vessels, still the crews were hired in accordance with the terms of the existing bargaining agreements between owners and the Unions of which the men were members. The supplies of the vessels were purchased by the steamship operators and delivered aboard the vessels pursuant to their directions. The operators through their employees, paid the seamen their wages. The masters kept official logs; the officers of vessels kept deck-logs and engine-room logs, and they operated their vessels in the same manner that vessels had always been operated. These steamships, operated by agents of the United States, were subject to the same regulations as to whether they should sail, when they should sail, where they should sail to, and what they should load, and where and when it should be loaded just the same as owners of private vessels within the jurisdiction of the United States were controlled in war-time.

The keeping of seamen who have always loved freedom, free from military constraint and control, has made them, under the flag of the United States, impervious to the seductive and traitorous suggestions of those who would

overthrow the government of the United States by force and establish a dictatorship.

The government, these seamen have preserved, now seeks to deprive them of the right to a jury trial, guaranteed to them not only by the Judiciary Act, but by the restatement of that right in the Jones Act itself.

The transfer of American vessels to foreign flags for cheaper operation, may have inspired our government, or those who have been in charge of it for the last two years, to deprive the seamen of a jury trial by restoring the ruling of the discredited Johnson-Lustgarten decision.

The U. S. Circuit Court of Appeals in *Kryakos* v. *Goulandris*, 151 Fed. (2) 132, applied the Jones Act to an injured seaman on a foreign vessel, while it was engaged in competing trade with vessels of the United States, but the Court of Appeals of New York, November 24, 1948 in *Sonnesoin* v. *Panama*, 298 N. Y. 262, held that a seaman who became ill on a Panama flag vessel, owned by a resident Standard Oil subsidiary—the Panama Transport Co. must plead and prove the foreign law, even though it might be contrary to the Public Policy of the forum—*i.e.*, the equalization policy of the Seamen's Act of March 4, 1915, *Dillon* v. *Strathearn*, 252 U. S. 348.

The United States Circuit Court of Appeals in the Second Circuit—in McAllister case—has held, as has this court, that the agent was the *pro hac vice* owner of the vessel, and in the case of *Mulligan* v. *Eastern Steamship Lines, Inc.*, November 1948, stated:

> "We hold that the appellant as the operating agent of the vessel, is not immune from suit because of the provisions of the Clarification Act, supra, and do so

for the reason stated in our recent decision in McAllister v. Cosmopolitan Shipping Co.—Second Circuit 1948; A. M. C. 1307-169; Fed. (2) 4."

Confusion in the uniform enforcement of the Maritime Law of the United States discussed by this court in *Workmen* v. *New York City*, 179 U. S. 552, page 558, and *Southern Pacific* v. *Jensen*, 244 U. S. 205, *Chelentis* v. *Luckenbach*, *supra*, will be avoided, if it is decided that the Clarification Act contains no provision, the intent of which was to effect the seamen's right to a jury trial.

Conclusion

While the Clarification Act has certain permissive features in view of the legislative history of the seamen's right to "a Jury Trial" as reiterated in the Jones Act, we say that in the absence of an Act of Congress to take it away, the right of a seaman to a jury trial still exists.

Respectfully submitted,

FRIENDS OF
ANDREW FURUSETH
LEGISLATIVE ASSOCIATION

SILAS B. AXTELL,
MYRON SCOTT,
HERBERT J. KAPLOW,
of Counsel.

Supreme Court of the United States

PETITION FOR REHEARING OF DECISION

INDEX

	PAGE
Statement	1
Plaintiff's Exhibit 4	9
Certificate	12

TABLE OF CASES

Caldarola v. Eckert, 332 U. S. 155	1, 2, 3, 5
Charles T. Banks et al. v. Charles Kurz Company and Independent Pier Company, 69 F. Supp. 61	7
Hust v. Moore McCormack Lines, 328 U. S. 707	5
Lewis v. U. S. Navigation Co., 57 F. Supp. 652	7
Morse v. Alaska Packers Association, 70 Cal. Appeals 2nd 857	7

IN THE

Supreme Court of the United States

October Term, 1948—No. 351

ROBERT A. MCALLISTER,

Petitioner,

—v.—

COSMOPOLITAN SHIPPING COMPANY, INC.,

Respondent.

Statement

WE FULLY APPRECIATE THAT THIS COURT NECESSARILY GAVE SERIOUS, CAREFUL AND DELIBERATE CONSIDERATION TO THE MAIN ISSUE INVOLVED HEREIN, AND THAT THE EFFECTS OF A DIFFERENT DECISION HEREIN MIGHT RESULT IN SERIOUS CONSEQUENCES TO BOTH NATIONAL AND INTERNATIONAL INTERESTS OF THE UNITED STATES, AND BE FAR REACHING AS A BASIS OF LIABILITY AFFECTING THE IMMUNITY OF GOVERNMENT VESSELS IN FOREIGN PORTS, AS WELL AS IMMUNITY FROM REGULATION AND TAXATION BY LOCAL GOVERNMENTS, AS STATED IN THE CASE OF *CALDAROLA* v. *ECKERT*, 133 U. S. 155. WE DO NOT SUGGEST THAT REARGUMENT BE CONSIDERED FOR THE PURPOSE OF CHANGING THE PRINCIPLE OF LAW LAID DOWN BY THIS COURT.

WE REALIZE THAT THE RULE LAID DOWN IN THE *CALDAROLA* CASE, *SUPRA*, AND IN THE CASE AT BAR WAS PROMPTED BY PRACTICAL AND

EQUITABLE CONSIDERATIONS AND WE DO NOT URGE ANY CHANGE THEREOF.

WE RESPECTFULLY SUBMIT THAT THESE AND OTHER SAFEGUARDS OF THE GOVERNMENT AND THEIR AGENTS LAID DOWN IN THE *CALDAROLA* CASE, *SUPRA*, AND THE CASE AT BAR, WOULD NOT BE WEAKENED OR IN ANYWISE AFFECTED BY A HOLDING IN THIS CASE THAT BECAUSE OF THE ACTS AND CONDUCT OF THE AGENT VIS-A-VIS THIS SEAMAN, THERE WAS CREATED THE RELATIONSHIP OF EMPLOYER AND EMPLOYEE BETWEEN THEM, IRRESPECTIVE OF THE *INTER SE* RELATIONSHIP BETWEEN THE AGENT AND THE GOVERNMENT SHIPOWNER.

THE LIABILITY OF COSMOPOLITAN SHIPPING CO. INC. AS ONE ACTING FOR AN UNDISCLOSED PRINCIPAL IS CLEARLY ESTABLISHED BY THE EVIDENCE.

We respectfully call certain facts to this Honorable Court's attention that it may, if it deems fit in the furtherance of substantial justice, modify its recent decision herein.

Justice demands that where this Honorable Court has seen fit to change the law, after a jury has found in favor of a plaintiff, that all grounds that would tend to sustain said jury's verdict should be considered.

This is particularly fitting and proper where McAllister relied on the statement of this Court which was made as late as June 23rd, 1947, by the same majority as in the case at bar, that for the purposes of the Jones Act the General Agent was the employer of the seaman. *Caldarola* v. *Eckert*, 332 U. S. 155.

McAllister, who was crippled, including partial paralysis of one arm, complete paralysis of the lower part of his

body including both legs, and who, according to the jury and the unanimous opinion of the Court of Appeals for the Second Circuit, was damaged to the extent of $100,000.00 by the fault of the ship's personnel, should not be relegated to charity for his existence and that of his wife and children, without this Honorable Court considering each and every feature of this case which would support the jury's verdict.

This Honorable Court stated in its opinion in the case at bar that it accepts as sound the reasoning in the *Caldarola* case, *supra*.

That being so, McAllister being a seaman, is entitled under the authority of the *Caldarola* case, *supra*, to hold the Cosmopolitan Shipping Company liable as the employer for the purposes of the Jones Act. Accordingly, it seems in place to urge that this Court reconsider the decision herein, which reversed the Court below. Should this Honorable Court be disinclined to reverse itself in the case at bar, we respectfully ask that it consider the other feature of this case, which in our humble opinion supports the verdict.

This Honorable Court had its attention focused on the over-shadowing issue of a War Shipping Administration Agent's liability for a tort committed by ship's personnel and failed to treat with the question of Cosmopolitan's liability while acting for an undisclosed principal. The record clearly and unequivocally supports the fact that Cosmopolitan acted in its own name as principal and that the War Shipping Administration and the United States of America were undisclosed principals.

The chief officer, the person next in charge to the captain himself, gave evidence to this effect, as did others of the crew, including McAllister, as will be pointed out hereafter by reference to the record herein.

The evidence was that the stamp which purported to put McAllister on notice, that he was being employed by the

United States of America was not on the shipping articles when he signed them. This evidence supports only one conclusion, namely, that the defense that the stamp was on the articles at the time that McAllister and the other seamen signed the same, is false and untrue and created out of whole cloth. We feel that this Court should not be concerned with the determination of a factual issue. The jury obviously did not believe the defense that the aforesaid stamp was on the articles at the time the crew signed on, and accordingly such view should be adopted by an Appellate Court which is not concerned with issues of fact.

The lie is given to the defense not only by the Chief Officer's testimony but likewise by the purser who stated in the accident report that Cosmopolitan was the employer.

In spite of the fact that Cosmopolitan in its contract with the Government was merely a General Agent it held itself out to the world in general and to the ship's officers and crew in particular, as the operator. (See Plaintiff's Exh. 4 annexed hereto.) Folio reference to testimony on this point will be made hereinafter.

This Honorable Court in reversing the Court of Appeals for the Second Circuit, stated:

> "HUST was decided June 10, 1946; CALDAROLA June 23, 1947. Certainly from the latter date, the danger of relying on HUST was apparent to the world though it must be admitted there was enough uncertainty in the law properly to give concern to Congress. Notwithstanding there may be some undesirable results in overruling HUST, such as loss of rights under the Suits in Admiralty Act by reliance on HUST, we think that in view of CALDAROLA, the uncertainty as to remedies that the two decisions generate, and the desirability of clarifying the position of the United

States as an employer through the War Shipping Administration, that case should be and is overruled."

In the *Caldarola* case, 332 U. S. 155, Mr. Justice Frankfurter writing for the majority of the Court at page 159, speaking of the case of *Hust* v. *Moore-McCormack Lines*, 328 U. S. 707, stated as follows:

"We there held that under the Agency contract the Agent was the 'employer' of an injured seaman as that term is used in the Jones Act, and a seaman could therefore bring the statutory action against such an 'employer.'"

We assumed from the foregoing portion of the said opinion that this Court reaffirmed the principle laid down in the *Hust* case, *supra*, insofar as seamen were concerned.

We misunderstood that portion of the opinion of this Honorable Court in the *Caldarola* case, *supra*, and assumed that the Court was distinguishing the *Caldarola* case from the *Hust* case, whereas, we now find that this Court believes that the *Hust* case, *supra*, and the *Caldarola* case, *supra*, are not reconcilable. On the basis of these mitigating circumstances, we ask the indulgence of this Honorable Court to consider the plea for re-argument on a proposition of law which although present in the case at bar, was not urged heretofore, by reason of our complete reliance on our misinterpretation of the holding of the *Hust* case, and what we thought was in substance, a reaffirmance thereof in the *Caldarola* case, *supra*.

We pray this Honorable Court to consider the question of the liability of Cosmopolitan as agent for an undisclosed principal.

The General Agency Agreement has been interpreted by this Honorable Court to make the master and crew em-

ployees of the United States of America and not employees of the General Agent.

This Honorable Court went further and stated that only one entity could be sued as the employer under the Jones Act. Mindful of this holding by this Honorable Court we nevertheless respectfully call attention to the fact the record shows that although the Cosmopolitan Shipping Company was under a contractual obligation to act only as agent of the United States of America, it did not so act. Factually, the record shows that Cosmopolitan Shipping Company hired McAllister as its own employee.

Pages 104 through 108 of the record show clearly that the plaintiff was given to understand and thought that he was being employed by the Cosmopolitan Shipping Company. The following quotation from page 107, fol. 321 of the record sums up all the testimony on this point in a few unequivocal words:

> "Q. From that conversation and from that interview what was your understanding as to who was hiring you? A. The Cosmopolitan Shipping Company."

Furthermore, the plaintiff was not alone in this understanding. On page 25 of the record, fols. 73, 74, George A. Linnartz, the chief officer testified that he was employed by the Cosmopolitan Shipping Company. Indeed, at page 26 in fol. 77, Linnartz further testified that no other entity than Cosmopolitan Shipping Company was mentioned to him as his employer and that he received his pay from the Cosmopolitan Shipping Company.

At page 89 of the record, fol. 267, Fred A. Bentz, a member of the engine department, upon being asked who was his employer replied that it was the Cosmopolitan Shipping Company.

At page 323 of the record, fol. 969, the testimony of Floyd Bullis, the acting first assistant engineer aboard the S.S. Edward B. Haines, is further example that the seamen understood that they were being employed by the Cosmopolitan Shipping Company.

This being so, the Cosmopolitan Shipping Company is liable as the actual employer in fact of McAllister, and liable as such under the Jones Act, notwithstanding the contract *inter se* between it and the United States of America which called for an entirely different relationship.

Factually, it is proven that the stamp purporting to put McAllister on notice that he was being hired on behalf of the United States of America was placed there after McAllister had signed the shipping articles, as it was not there when he signed the articles.

McAllister testified on page 109, fol. 327, that the first time he recalled seeing the stamp on the articles which read "you are being employed by the United States", was when the articles were offered in evidence at the trial.

We feel that justice demands that the jury's verdict be sustained notwithstanding the fact that this Court ruled that the General Agent cannot be held liable in a Jones Act case. This Honorable Court apparently assumed that the principal was disclosed. The verdict can be supported on the proposition of law that the Cosmopolitan Shipping Company is liable as the agent for an undisclosed principal.

This proposition of law has substantially been conceded by the government in its brief in support of petition for writ of certiorari in footnote, page 111.

The Government not only conceded that this was the law, but cited the following cases in support thereof: *Lewis* v. *U. S. Navigation Co*, 57 F. Supp. 652, and *Morse* v. *Alaska Packers Association*, 70 Cal. Appeals 2nd 857. In this connection we also cite *Charles T. Banks, et al.* v. *Charles*

Kerr Company and Independent Pier Company, 69 F. Supp. 61.

McAllister respectfully prays for modification of this Honorable Court's decision herein to the extent that his verdict be sustained on the Law of Agency applicable to agents of undisclosed principals. Should this Honorable Court entertain some doubt as to the sufficiency of the proof to support McAllister's prayer, then as alternative relief McAllister prays that this sole issue of fact be re-submitted for determination by a jury in the District Court below, this Honorable Court having done as much in the *Weade* case, which was argued together with the case at bar, though treating with a different factual issue, and for such other and further relief as to this Honorable Court may seem just and proper.

Respectfully submitted,

BERTRAM J. DEMBO,
Attorney for Petitioner.

Plaintiff's Exhibit 4

REPORT OF ILLNESS

S. S. Edward B. Haines Voy. No. 7

Owner or Operator Cosmopolitan Shipping Co., Inc.

Date of Sailing July 31, 1945

1. The Patient
Name (In Full) McAllister, Robert Alexander
Certificate No. Z-272774
Address 235 Bertsch Street, Lansford, Pa.
Rating Second Engineer Citizen or alien Citizen
Age 25 Color White Sex Male
Married or single Married
Name of nearest relative Ann McAllister
Relationship Wife Address same as above.

2. (a) In whose employment when taken ill Cosmopolitan Shipping Company, Inc.
(b) How long employed 4½ months
(c) Wages per Month $220.00 per month

3. (a) Date man-signed on July 20, 1945
(b) Where New York
(c) Articles (Foreign) F.
(d) Did he submit to physical examination prior to employment? Yes.
(e) By whom examined WSA (New York)
(f) Where examined 107 Washington St.

4. (a) Date Discharged December 1st, 1945
(b) Where Tsingtao, China
(c) Before whom Captain Leavitt.
(d) Amount of wages paid Advance ($76.02)
(e) Disposition personal effects Cared for by patient.

4. Date crew paid off for this voyage .....
   (a) Date expected to terminate voyage: .....
   (b) Port .....

6. Illness contracted: (a) Date 11/24/45
   (b) Hour .....
   (c) Place At Sea (aboard)
   (d) To whom first reported Patrick E. Napier, Psr. Ph. M.
   (e) When same day
   (f) Location of vessel when illness first reported At Sea—Shanghai toward Tsingtao
   (g) Sick person's version of how illness was contract and cause thereof: .....
   .....

ROBERT A. MCALLISTER
(Sick persons signature)

7. Physical signs and symptoms .....
   .....

8. Diagnosis (for observation).

(Stamp)
Reported to
Marine Index Bureau
60 John Street, New York
Date sent 12/28/45

9. Treatment (give full details).....
   .....

10. Condition of patient on discharge from vessel no appetite, dizziness, unable to hold food on the stomach—weak.

11. Final disposition of patient .....

.....

12. If sent to hospital, state where, when admitted, and at whose request Division Field Hospital #1, 6th Marine Div. Tsingtao, China. Admitted 11/30/45. Lt. Cmdr. D. J. Giorgio USN—MC.

13. Probable period of disability .....

14. Witnesses version as to whether disability due to misconduct .....

.....

15. If ill before embarkation, by whom treated No.
(a) Where ..... (b) How long .....

16. Similar previous illness if any; (a) When .....
(b) Where ..... (c) Detail .....

.....

17. Remarks .....

.....

Names of Persons Who Knew of Illness and Treatment Afforded

Patrick E. Napier, Purser/Ph. M.
Home and Mailing Addresses
Route 12 Box 220 Sayler Park
Station—Cincinnati 33, Ohio

Certificate

To the Honorable Chief Justice and Honorable Associate Justices of the Supreme Court of the United States:

Honorable Sirs:

The undersigned attorney for the petitioner hereby certifies that the Petition for Rehearing of Decision herein is presented in good faith and not for the purpose of delay.

Respectfully submitted,

BERTRAM J. DEMBO,
Attorney for Petitioner.

Dated, New York, New York, June 30, 1949.